

VIDEO SURVEILLANCE

This is the third and final part of the series: *Electronic surveillance, email and documentary evidence* by Mr Arthur Moses, a barrister with Frederick Jordan Chambers in Sydney NSW.

Recording of conversations with employees about performance and conduct

There is relevant legislation at both the Territory and Federal levels dealing with various aspects of recording conversations, both face to face and on the telephone: the *Listening Devices Act (NT)* and the *Telecommunications (Interception) Act 1979 (Cth)*.

The Territory legislation is expressed in general terms and applies to all conversations; the Federal legislation is expressed to apply only to what it calls the interception of phone calls. However, whereas in relation to phone calls, both the Territory and Federal Parliaments have power to legislate in a particular area, the High Court of Australia has held that the Federal legislation covers the field: see *Miller v Miller* (1978) 141 CLR 269.

Listening Devices Act (NT) - can you bug your own office?

The answer in general is, yes, so long as you are taking part in the bugged meeting. The focus of the *Listening Devices Act (NT)* which covers covert recording is intrusion into other people's conversations. The general principle underlying the *Listening Devices Act (NT)* is that you must not intrude into, or intercept, a conversation which is not your conversation. But if you are taking part in a conversation, you may record it, even though others who are present do not know or indeed, even though they know and disagree.

In some states, simply being a party to a conversation entitles you to record it (Victoria, Queensland, Western Australia, Northern Territory): see for example s.8 of the *Listening Devices Act (NT)*. In others (NSW, Tasmania, ACT), you must make the recording either:

- (a) without any intention of publishing it (or a transcript of it) to anyone who was not present at the meeting (i.e.: in effect, using it as your private electronic notebook, though with the scope, is anyone who had been present later disagreed with your version of events, of playing it to such a person); or
- (b) for the reasonable protection of your own lawful interests. This provision is very wide and allows recording of any discussion in which the exact

“Despite restrictions on the use of video surveillance and listening devices, there are situations where employers can make use of such measures.”

terms of what was said both to and by a person could effect the lawful interests of that person.

In South Australia, simply being a party is not enough; the recording needs to be made in the course of duty, in the public interest, or for the protection of one's lawful interests.

Examples of recordings which are clearly prohibited by the *Listening Devices Act (NT)* are: the pre-interview discussions of the employee and his/her representative in the private waiting room provided for them, and the discussions which may occur behind an employee's back after he/she has a disciplinary meeting.

The legislation in all states restricts the communication of such recordings to other people. The common theme, however, is that they may be communicated for the protection of one's lawful interests.

Telecommunications (Interception) Act 1979 (Cth)

This legislation prohibits the interception of a communication passing over a telecommunications system (s.7). It defines interception and provides that certain activities do not amount to interception (s.6).

There are two important preliminary points to note. First, the definition of interception includes “without the

knowledge of the person making the communication”. The concept of interception is crucial to this legislation. *The Court of Criminal Appeal in New South Wales in R v Edelsten* (1990) 21 NSWLR 542 at 547 has approved the statement that:

“The Act in seeking to control interception of communications, is concerned to protect the privacy of communications passing between users of the system established by the Commission.”

In this context, the Supreme Courts of both South Australia and Western Australia have declared that interception means the intrusion of a third party. Thus:

“I do not consider that there is any good reason why the law with respect to telecommunications should proscribe and render inadmissible in evidence a recording such as that made here of something said by B over the phone to A, B knowing that A is listening to him...”

“I prefer and adopt the interpretation... that any intrusion by a third party into a communication from A (the caller) to B (the intended recipient) in its passage over the system from caller to intended recipient will be an interception if made without the knowledge of the caller or the recipient.”

(*T v The Medical Board of South Australia* (1992) 58 SASA 382 at 398-399)

This interpretation was endorsed by the *Court of Criminal Appeal of Western Australia Green v The Queen* (1996) 124 FLR 423 at 431-432. Thus, recording of a phone conversation by a party to the conversation is not interception and therefore not prohibited or regulated by this legislation. But because it is not interception, it falls outside the field covered by the federal legislation, and therefore within the area covered by the Territory legislation, so that

recording of phone calls by a party to the call is subject to what has been explained above about the Listening Devices Act (NT).

The second point to note is that interception of a communication can occur only "in its passage over" the system. This has been interpreted to mean, logically enough, that to record the sound after it has passed fully over the system, that is, once it has resonated out of the earpiece, by means for example of a microphone held near the earpiece, is not interception; the same would apply to recording similarly the output of a conference phone: see for example *R v Oliver (NSW Court of Criminal Appeal)*(1984)57ALR543.

Thus recording in such circumstances, that is, after the message has completed its passage over the telephone system, is not covered at all by the Federal legislation, and being, like calls recorded by a party, outside the field covered by the Federal legislation, is also subject to what has been explained above about the Listening Devices Act (NT).

Recording of phone calls by someone who is not a party, using equipment which is electronically linked to the phone system, or by equipment which responds to the electromagnetic field generated by the passage of messages over that system, is interception, and so covered by the Federal legislation.

That Act allows interception in some circumstances, and achieves that by defining particular circumstances as not constituting interception.

For the purposes which I am considering, they are:

"(2) Where a person lawfully on premises to which a telecommunications service is provided by a carrier, by means of any apparatus or equipment that is part of that service:

- (a) listens to or records a communication passing over the telecommunications system of which that service forms a part, being a communication that is being made to or from that service; and
- (b) listens to or records a communication passing over the telecommunications system of which that service forms a part, being a communication that is being received at that service in the ordinary course of the operation of that telecommunication system." (see s.6(2))

A person who is not party to a phone call and who records that phone call at that person's office (or home or other premises) falls entirely within this provision, and therefore may freely record such phone calls, with one important qualification: the recording must be made by means of apparatus or

equipment "that is part of the service". The precise meaning of this unfortunately obscure - one thing it certainly means is that recordings may not be made with equipment which is not part of the service, meaning equipment which is not linked directly to the phone system.

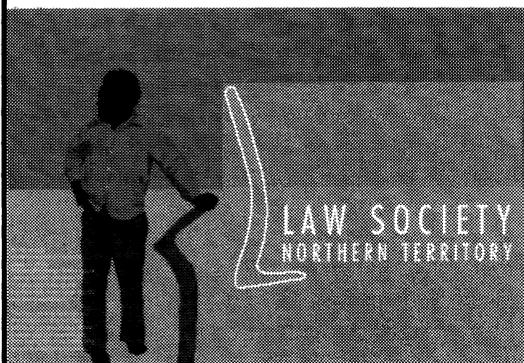
Conclusion

Despite restrictions on the use of video surveillance and listening devices, there are situations where employers can make use of such measures. These measures may prove useful tools to employers particularly in cases of misconduct involving breach of the criminal law.

There are however, onerous restrictions and obligations placed upon employers seeking to rely upon these measures and extreme care must be exercised to ensure that the relevant legislation is not breached and the use of measures does not back fire on the employer. Appropriate use can however provide employers with useful devices with which to defend themselves against unmeritorious and vexatious claims.

In addition, employers need to maintain appropriate written records of all dealings with employees particularly in respect of disciplinary meetings, counselling sessions, warnings as to performance and the procedures adopted in addressing employee issues. These will assist an employer to defend subsequent allegation of unfairness made against it.

PRINT FOR SALE



A limited edition print, featuring the Law Society's new corporate logo, is available for purchase for \$50.00.

The print was recently presented to the Chief Justice of Western Australia and Attorney General Denis Burke at the Opening of the Legal Year lunch in Darwin.

Only a limited number are available. Please contact the Law Society with your order on 8981 5104.