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PARENTS: DO TWO WRONGS
MAKE A RIGHT?

COVERT RECORDINGS BY PARENTS: DO TWO WRONGS MAKE A RIGHT?

Monique Robb, Partner and Accredited Specialist - Family Law
Lander & Rogers Sydney
Leah Reid, Barrister, Greenway Chambers

As family lawyers, it is increasingly common for clients to present us with "proof" of their assertions, by way of videos or voice recordings, usually recorded on their smartphones, tablets or other devices. On some occasions, webcams, surveillance devices, or security cameras may be responsible for the recordings. Often, these recordings are thrust towards us in conference, or pop up in our inbox, without warning – having been made without advice.

Notwithstanding the firmly-held beliefs of clients that these recordings will vindicate their position and win the day, the reality is often more complex.

Given the ubiquitous and convenient nature of this type of surveillance technology, as Justice Le Poer Trench predicted in *Leos & Leos*,¹ it is likely that:

as devices commonly in use in our society, such as mobile phones, develop even more capabilities than they currently have, the type of surveillance evidence which is sought to be relied upon will become a common feature in litigation in this Court.

This paper examines the role of covert recordings in parenting matters and considers when they can be admitted as evidence, and the potential consequences of tendering such material.

In what kind of matters might covert recordings arise as an issue?

- Where there are allegations of family violence² (including where the recording itself is a part of a perpetrator's coercive and controlling behaviour or stalking);
- Where there are allegations of child abuse;
- Where there is conflict at changeovers;
- Where there are allegations in respect to the conduct of the other party; and / or
- Where the parties disagree about whether a de facto relationship existed.

The recordings may be:

- Parent A recording Parent B's conduct (e.g. at changeovers);
- Parent A recording the children's conduct with Parent A (e.g. recording conversations where a child is allegedly disclosing child abuse);
- Parent A recording Parent B's interactions with the children;³

¹ [2017] FamCA 1083

² *Shelbourne & Shelbourne* [2017] FamCA 76.

³ See for example, above n 2.

- Third parties (e.g. grandparents) recording the parents and/or the children;
- Parent A recording parts of the legal process (e.g. interviews with the family consultant).⁴

What is a covert recording?

There is no specific legal definition of "covert recording"; rather it is a term we will adopt for the purposes of this paper, to cover any recording made without the consent of both parties, or where the recording is not legal in accordance with the applicable legislative provisions in the relevant state or territory.

What laws govern filming or recording a conversation without the knowledge or permission of the other person?

Each State and Territory has enacted legislation in relation to "surveillance devices" used to record in-person conversations. Extracts of the relevant provisions are in the table below. As the Australian Law Reform Commission noted:

The surveillance device laws of each state and territory differ greatly, both in terms of the types of surveillance devices they regulate, and the circumstances in which those surveillance devices may or may not be used.⁵

Broadly speaking:

- Victoria, Queensland and Northern Territory have the least stringent provisions, permitting a participant to a private conversation to record the conversation without the consent of the other participants.
- South Australia, Western Australia, Tasmania, and Australian Capital Territory, and New South Wales have exceptions if a recording is made with the consent of all principal parties, or is "reasonably necessary" to protect the "lawful interests" of a principal party. The "reasonably necessary" exception in the Australian Capital Territory legislation is expressed as subjective; the other States have objective tests.

Jurisdiction	Relevant provision
Victoria	Section 6(1) of the <i>Surveillance Devices Act 1999</i> (VIC) provides: (1) Subject to subsection (2), a person must not knowingly install, use or maintain a listening device to overhear, record, monitor or listen to a private conversation to which the person is not a party, without the express or implied consent of each party to the conversation. ...
Queensland	Section 43 of the <i>Invasion of Privacy Act 1971</i> (QLD) provides:

⁴ See for example, *Hazan & Elias* [2011] FamCA 376. In that case, Justice Watts determined that the husband's secret recording contravened Rule 1.19 of the *Family Law Rules 2004* (Cth).

⁵ Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Report No 123 (2014), 45 [3.23].

Jurisdiction	Relevant provision
	<p>(1) A person is guilty of an offence against this Act if the person uses a listening device to overhear, record, monitor or listen to a private conversation and is liable on conviction on indictment to a maximum penalty of 40 penalty units or imprisonment for 2 years.</p> <p>(2) Subsection (1) does not apply—</p> <p>(a) where the person using the listening device is a party to the private conversation; or</p> <p>...</p>
Northern Territory	<p>Section 11(1) of the <i>Surveillance Devices Act 2007</i> (NT) provides:</p> <p>(1) A person is guilty of an offence if the person</p> <p>(a) installs, uses or maintains a listening device to listen to, monitor or record a private conversation to which the person is not a party; and</p> <p>(b) knows the device is installed, used or maintained without the express or implied consent of each party to the conversation.</p> <p>...</p>
South Australia	<p>Section 4 of the <i>Surveillance Devices Act 2016</i> (SA) provides:</p> <p>(1) Subject to this section and section 6, a person must not knowingly install, use or cause to be used, or maintain, a listening device—</p> <p>(a) to overhear, record, monitor or listen to a private conversation to which the person is not a party; or</p> <p>(b) to record a private conversation to which the person is a party.</p> <p>(2) Subsection (1) does not apply—</p> <p>(a) to the use of a listening device by a party to a private conversation to record the conversation if—</p> <p>(i) all principal parties to the conversation consent, expressly or impliedly, to the device being so used; or</p> <p>(ii) the use of the device is reasonably necessary for the protection of the lawful interests of that person; or</p> <p>...</p>
Western Australia	<p>Section 5 of the <i>Surveillance Devices Act 1998</i> (WA) provides:</p> <p>(1) Subject to subsections (2) and (3), a person shall not install, use, or maintain, or cause to be installed, used, or maintained, a listening device —</p> <p>(a) to record, monitor, or listen to a private conversation to which that person is not a party; or</p> <p>(b) to record a private conversation to which that person is a party.</p> <p>...</p>

Jurisdiction	Relevant provision
	<p>(3) Subsection (1)(b) does not apply to the installation, use, or maintenance of a listening device by or on behalf of a person who is a party to a private conversation if —</p> <p>...</p> <p>(c) each principal party to the private conversation consents expressly or impliedly to that installation, use, or maintenance; or</p> <p>(d) a principal party to the private conversation consents expressly or impliedly to that installation, use, or maintenance and the installation, use, or maintenance is reasonably necessary for the protection of the lawful interests of that principal party.</p>
Tasmania	<p>Section 5 of the <i>Listening Devices Act 1991</i> (TAS) provides:</p> <p>(1) A person shall not use, or cause or permit to be used, a listening device —</p> <p>(a) to record or listen to a private conversation to which the person is not a party; or</p> <p>(b) to record a private conversation to which the person is a party.</p> <p>...</p> <p>(3) Subsection 1(b) does not apply to the use of a listening device by a party to a private conversation if —</p> <p>(a) all of the principal parties to the conversation consent, expressly or impliedly, to the listening device being so used; or</p> <p>(b) a principal party to the conversation consents to the listening device being so used and —</p> <p>(i) the recording of the conversation is reasonably necessary for the protection of the lawful interests of that principal party; or</p> <p>(ii) the recording of the conversation is not made for the purpose of communicating or publishing the conversation, or a report of the conversation, to persons who are not parties to the conversation.</p>
Australian Capital Territory	<p>Section 4 of the <i>Listening Devices Act 2002</i> (ACT) provides:</p> <p>(1) A person must not use a listening device with the intention of—</p> <p>(a) listening to or recording a private conversation to which the person is not a party; or</p> <p>(b) recording a private conversation to which the person is a party.</p> <p>...</p> <p>(3) Subsection (1) (b) does not apply to the use of a listening device by, or on behalf of, a party to a private conversation if—</p> <p>(a) each principal party to the conversation consents to that use of the listening device; or</p>

Jurisdiction	Relevant provision
	<p>(b) a principal party to the conversation consents to the listening device being so used, and—</p> <ul style="list-style-type: none"> (i) the recording of the conversation is considered by that principal party, on reasonable grounds, to be necessary for the protection of that principal party's lawful interests; or (ii) the recording is not made for the purpose of communicating or publishing the conversation, or a report of the conversation, to any person who is not a party to the conversation. <p>...</p>
New South Wales	<p>Section 7 of the <i>Surveillance Devices Act 2007</i> (NSW) provides:</p> <p>(1) A person must not knowingly install, use or cause to be used or maintain a listening device:</p> <ul style="list-style-type: none"> (a) to overhear, record, monitor or listen to a private conversation to which the person is not a party, or (b) to record a private conversation to which the person is a party. <p>...</p> <p>(3) Subsection (1) (b) does not apply to the use of a listening device by a party to a private conversation if:</p> <ul style="list-style-type: none"> (a) all of the principal parties to the conversation consent, expressly or impliedly, to the listening device being so used, or (b) a principal party to the conversation consents to the listening device being so used and the recording of the conversation: <ul style="list-style-type: none"> (i) is reasonably necessary for the protection of the lawful interests of that principal party, or (ii) is not made for the purpose of communicating or publishing the conversation, or a report of the conversation, to persons who are not parties to the conversation.

At the Commonwealth level, the *Telecommunications (Interception & Access) Act 1979* (Cth) covers matters involving surveillance devices installed in telephones (for example, recording skype conversations or smartphone apps that record telephone calls).⁶ Section 6(1) of *Telecommunications (Interception & Access) Act 1979* (Cth) relevantly provides:

(1) For the purposes of this Act (other than Schedule 1), but subject to this section, interception of a communication passing over a telecommunications system consists of listening to or recording, by any means, such a communication in its passage over that telecommunications system without the knowledge of the person making the communication.

Section 7 of the *Telecommunications (Interception & Access) Act 1979* (Cth) provides:

(1) A person shall not:

⁶ See for example, *Kyriakou & Zenakis* [2017] FamCA 420; *Russell & Russell* [2012] FamCA 99.

- (a) intercept;
- (b) authorize, suffer or permit another person to intercept; or
- (c) do any act or thing that will enable him or her or another person to intercept;

a communication passing over a telecommunications system.

A contravention of section 7(1) is an offence under s 105 *Telecommunications (Interception & Access) Act 1979* (Cth).

The *Evidence Act 1995* (Cth) governs the admissibility of covert recordings in family law proceedings.

What is a “listening device”? What is a “private conversation”? Who is a “principal party”?

Section 4 of the *Surveillance Devices Act 2007* (NSW) defines a 'listening device' as:

any device capable of being used to overhear, record, monitor or listen to a conversation or words spoken to or by any person in conversation, but does not include a hearing aid or similar device used by a person with impaired hearing to overcome the impairment and permit that person to hear only sounds ordinarily audible to the human ear.

Similarly, a principal party is also defined in s 4 of the *Surveillance Devices Act 2007* (NSW) as “*in relation to a private conversation, means a person by or to whom words are spoken in the course of the conversation*”.

In particular, section 4 also defines a 'private conversation' as:

any words spoken by one person to another person or to other persons in circumstances that may reasonably be taken to indicate that any of those persons desires the words to be listened to only:

- (a) by themselves, or
- (b) by themselves and by some other person who has the consent, express or implied, of all of those persons to do so,

but does not include a conversation made in any circumstances in which the parties to it ought reasonably to expect that it might be overheard by someone else.

It is therefore important to consider the context of where the conversation took place – for example, a conversation between the parents in the carpark of a McDonalds during changeover may not be “private conversation”.⁷

Criminal Penalties

⁷ This example and others can be found at Domestic Violence Resource Centre Victoria, *ReCharge: Women’s technology safety, legal resources, research & training - Legal Guide to Surveillance Legislation in New South Wales*, available at http://www.dvrcv.org.au/sites/default/files/ReCharge-Legal-Guide-NSW-Surveillance_0.pdf

Breach of s 7(1) *Surveillance Devices Act 2007* (NSW) has a maximum penalty of 500 penalty units (in the case of a corporation) or 100 penalty units or 5 years imprisonment, or both (in any other case). Penalty units are equivalent in value to \$110.⁸ Other States and Territories have similar penalties.

In the matter of *Leos & Leos*,⁹ the father was charged on two counts under the *Surveillance Devices Act 2007* (NSW) with firstly to installing or using a listening device to record a private conversation, and secondly to publishing a conversation (sections 7(1)(a) and 11(1) respectively). He pled guilty and was sentenced to two 18-month bonds under (what was, in 2014) section 9 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) and was fined \$1,000. In family law proceedings, the father deposed he hired a private investigator to record the mother and children in the former matrimonial home due to his concern that the mother was verbally and physically abusing the children.¹⁰

When is an illegally obtained recording admissible as evidence in Family Court proceedings?

In NSW, ACT, Tasmania, South Australia and Western Australia, the Federal Circuit and Family Court of Australia is required on a more regular basis to grapple with whether a recording has been made illegally, due to the drafting of the legislation in those states and territory. For the remaining States and Territory, the question arises only where a recording has been made of a conversation to which the person recording was not a party.

In all jurisdictions, it is illegal for a person who is not a party to a private conversation, to record same— with obvious exceptions for various government organisations as authorised by legislation or a warrant. Due to the nature of the recordings used in Family Law proceedings, this paper will not deal with recordings made by government organisations.

The exceptions set out in the *Surveillance Devices Act 2007* (NSW) to the general prohibition on recording private conversations without the consent of both parties have been considered at length because of the sheer volume of cases heard in New South Wales in the Family Law jurisdiction. As Tasmania, South Australia and Western Australia and the ACT have equivalent provisions (set out above), we will consider in depth the NSW provisions as illustrative of the relevant law in family law proceedings.

Does an exception apply such that the recording is lawful?

In family law proceedings in NSW, the most commonly applicable exception to the general prohibition on recording private conversation is found in s 7(3) *Surveillance Devices Act 2007* (NSW) (set out in the table above). The test to be applied where the consent of all principal parties to a private conversation has not been obtained, is as follows:

1. Did a principal party to the conversation consent to the recording; and
2. Was the recording reasonably necessary for the protection of that principal party's lawful interests?

The first step of the test does not usually pose a hurdle because the party who recorded the private conversation is usually a principal party and usually consents!

⁸ *Crimes (Sentencing Procedure) Act 1999* (NSW) s17.

⁹ [2017] FamCA 1038.

¹⁰ *Leos & Leos* [2017] FamCA 1038 at [29].

What justifications might constitute a 'lawful interest'?

The NSW Court of Criminal Appeal in *DW v The Queen*¹¹ provides an extensive discussion of the meaning of a 'lawful interest' in relation to s 7(3) of the *Surveillance Devices Act 2007* (NSW) at paragraphs 27 to 37.

In that case, a recording had been made by a child complainant who alleged she had been sexually abused by her father, who indecently assaulted her and required her to pose for pornographic photographs.

The recording was made on the fourteen year old's smartphone, which she placed in her pocket prior to a conversation with her father, the defendant, in respect to his demands for photographs of the child. The defendant appealed his conviction, in part on the basis that the recording was not for the protection of the child's lawful interest.

The Court of Criminal Appeal (Ward JA, Hulme and Harrison JJ) considered that "lawful interest" encompassed:

- the desire of a person to protect themselves from being charged with making false allegations against other people.¹²
- 'where a serious dispute erupted'¹³ and it was anticipated that there will be a dispute as to different versions of an arrangement as being a matter which might give rise to such a lawful interest.
- Where the complainant recorded acts of violence against her 'as a legitimate means of defence against the extreme levels of harm and danger she faced' and those recordings were 'spur of the moment decisions'.¹⁴
- Where the conversation related to a serious crime or an allegation of a serious crime rather than 'a mere desire to have a reliable record of a conversation'.¹⁵

The Court of Criminal Appeal noted that a lawful interest did not require the interest to be a "legal interest, in the sense of a legal right, duty or liability".

"Lawful interest" - consideration in Family Law Proceedings

In *Corby & Corby*,¹⁶ the mother alleged a history of coercive and controlling violence by the father. In particular, she alleged the father was sexually coercive, intimidating, and physically violent. The mother had made recordings of various conversations with the father. The mother sought to tender the recordings into evidence, at final hearing.

Drawing on *DW v R*, Judge Sexton determined the mother had a lawful interest:

...not to be intimidated or harassed, and not to be forced to respond to the Father's demands for sexual activity, and that section 7(3)(b)(i) is therefore satisfied in relation to the term "lawful interests".¹⁷

¹¹ [2014] NSWCCA 28.

¹² See also *R v Le* [2004] NSWCCA 82 at [83]; *Corby & Corby* [2015] FCCA 1099 at [30].

¹³ *Chao v Chao* [2008] NSWSCC 584 at [8].

¹⁴ See also *R v Coutts* [2013] SADC 50, at [26].

¹⁵ *Thomas v Nash* [2010] SASC 153 at [48]; *RRG Nominees Pty Ltd v Visible Temporary Fencing Australia Pty Ltd (No.3)* [2018] FCA 404 at [31].

¹⁶ [2015] FCCA 1099.

¹⁷ *Ibid*, at [23].

In *Gawley & Bass*,¹⁸ the father had installed listening devices in the mother's home, due to concerns about the abuse of the children whilst in the mother's care. The father sought to adduce an affidavit containing transcripts of the recordings. Drawing on an earlier decision of *Latham & Latham* [2008] FamCA 877, Judge Baker extended the notion of 'lawful interest' and found that '*the father has a lawful interest as a parent of the children to protect them from risk of harm*'¹⁹ with that lawful interest arising as an incident of parental responsibility.

In *Shelbourne & Shelbourne*²⁰ Justice Rees, also drawing on *DW v R* as to what constituted a lawful interest, admitted video recordings made by the father of the mother's violent behaviour. These videos included the mother threatening to harm herself and the parties' three month old baby, and videos of the mother verbally abusing the father in the children's presence. The children are described as being "terrified" and "extremely distressed" in these videos. Her Honour stated:

In circumstances of counter allegations of violence and threats of violence, I accept that the recording by the father, of the mother's behaviour, comes within the exception provided by s 7(3)(b)(i) of the *Surveillance Act*.²¹

In *Jasper & Corrigan (No 2)*,²² the applicant sought to adduce recordings of conversations in circumstances where there was a dispute as to whether the parties were in a de facto relationship. Judge Altobelli, noting that he was dealing with the applicant as a litigant-in-person, found that the recordings fell within the "lawful interest" exception of the *Surveillance Devices Act 2007* (NSW), where, as with cases in which parties seek to tender recordings as evidence of family violence, the conversations were otherwise "*her word against his*". His Honour ultimately found the recordings were legally obtained and therefore admissible, but cautioned that admissibility and the weight to be placed on the evidence, were two separate questions.

In the case of *Luo & Bassett*,²³ the parents were in dispute regarding parenting arrangements. The father sought to adduce a recording of an exchange with the mother following a changeover. Queens Counsel who appeared on behalf of the mother objected to the inclusion of the transcript as evidence as it fell foul of s 7 of the *Surveillance Devices Act 2007* (NSW).²⁴ However, Christie J declined to exercise discretion under s 135 of the *Evidence Act* to exclude the recording as it was relevant, not illegally obtained and reasonably necessary for the protection of the lawful interests of the father.²⁵

The recording captured the mother confronting the father in the presence of the child. The mother's anger also escalated, swearing and involving the child in the conversation, while she also conceded to hitting the father on the recording. Her Honour considered the evidence to be admissible, and relevant to issues '*including the parties' capacity to communicate, cooperate and co-parent, the exposure of the child to conflict and a determination of whether or not there had been family violence.*'²⁶

¹⁸ [2016] FCCA 1955.

¹⁹ *Ibid*, at [52].

²⁰ Above n 3.

²¹ *Ibid*, at [36].

²² [2017] FCCA 1467.

²³ [2022] FedCFamC1F 178.

²⁴ *Ibid*, at [17].

²⁵ *Ibid*, at [21] - [23].

²⁶ *Ibid*, at [24].

What might constitute 'reasonably necessary'?

In the case of *Sepulveda v R*,²⁷ McClellan CJ considered the proper construction of the term 'reasonably necessary' as 'reasonably appropriate (rather than essential)'.²⁸ The test, therefore, is to be "...judged objectively upon bases or grounds that exist at the time of the recording".²⁹

The Court found that the ability of the maker to approach the police acted as an impediment to a finding of 'reasonable necessity'.³⁰

This approach was, however, reconsidered in *DW v R*, where the Criminal Court of Appeal indicated that "reasonably necessary" should be:

- judged objectively on the bases or grounds that exist at the time of making the recording;
- have regard to the position of the person being recorded/undertaking the recording. For example, it is not reasonable to expect a child being abused to approach the Department of Family and Community Services (or equivalent)/police, or for an adult in an abusive relationship to contact authorities; and
- should consider whether there were reasonable alternatives to recording.

This was affirmed in the case of *Corby & Corby*,³¹ where Judge Sexton applied the decision of the Court of Criminal Appeal in *DW v R*.³² Her Honour found it was reasonably necessary for the mother to covertly record the father's coercive behavior, where:

- the recordings were made at the time of the offence;³³
- it was not realistic to expect a victim of family violence to approach police;³⁴ and
- the evidence "may lead the Court to conclude that the child is presently at risk in the other parent's care."³⁵

Reasonable necessity was also considered in *Gawley & Bass* where the Court found the "context of the recording of this conversation was [the father's] concern in relation to an alleged assault on W".³⁶

In *Michaels & Harradine*,³⁷ Gill J considered the 'substantiation of private violence' by way of covert recordings reasonably necessary to protect the mother in circumstances of a contested factual dispute.³⁸ In that matter, the father had denied the family violence allegations put by the mother, there were no witnesses³⁹ and the violence occurred 'on a somewhat isolated property'.⁴⁰

²⁷ [2006] NSWCCA 379

²⁸ Ibid, at [117]; affirmed in *DW v R* [2014] NSWCCA 28.

²⁹ Ibid at [118].

³⁰ Ibid at [139].

³¹ Above n 19.

³² [2014] NSWCCA 28.

³³ *Corby & Corby* [2015] FCCA 1099 at [29].

³⁴ Ibid.

³⁵ Ibid, at [36a].

³⁶ Above n 19, at [53].

³⁷ [2018] FamCA 657.

³⁸ Ibid, at [13].

³⁹ Ibid, at [12].

⁴⁰ Ibid, at [6].

In *Giunta & Giunta (No 2)*,⁴¹ McClelland DCJ referred to the decision by Rees J in *Rathswohl & Court*,⁴² which summarised the considerations that '*may indicate whether recording a private conversation without consent may be "reasonably necessary for the protection of the lawful interests" of the person making the recording*':

- (a) Whether the purpose of the conversation was to obtain admissions in support of a legitimate purpose. The contentious subject matter of the conversation, or the characteristics of the person being recorded, may indicate that it was necessary to make the recording in order to secure the admission. Recording a conversation for the purpose of extracting money, inducing further improper conduct or to blackmail the recorded party will indicate to the contrary.
- (b) Whether it was important to protect oneself from being accused of fabricating a conversation and recording the conversation was the only practical means of refuting such an allegation. This is more likely to be the case where the conversation concerns a serious criminal matter or the principal party has a genuine concern for their safety or that of their children.
- (c) Whether there were other practical means of recording the conversation, for example, reporting the matter to police or making a contemporaneous file note.
- (d) Whether there was a serious dispute on foot between the parties, including where determination of the dispute would vitally depend upon oral evidence and thus, one person's word against another. Recordings of conversations 'just in case' there is a dispute, or for the sake of making an accurate record of what was said, is not enough.⁴³

Admission of recordings which are not lawful under the exception

Whilst many of the recordings provided by parties to proceedings will be admissible either on the basis they are lawful (particularly in Victoria, Queensland, or Northern Territory), or fall within the exceptions set out above, there are recordings which will remain unlawful - for example, where listening devices have been used to covertly record one party in their home (where the other party is not present), or where recordings have been made by a third party who is not a principal to the conversation (such as grandparents, uncles and aunts, friends, and the like who have recorded incidents on behalf of a party).

Such illegal recordings may still be admissible under s 138 of the *Evidence Act 1995 (Cth)*, assuming of course, that the recordings are relevant.⁴⁴

Section 138 of the *Evidence Act 1995 (Cth)* states:

- (1) Evidence that was obtained:
 - (a) improperly or in contravention of an Australian law; or

⁴¹ [2020] FamCA 1045.

⁴² [2020] NSWSC 1490.

⁴³ Above n 39 at [3].

⁴⁴ *Evidence Act 1995 (Cth)*, ss 55, 56.

(b) in consequence of an impropriety or of a contravention of an Australian law;

is not to be **admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.** [emphasis added]

...

- (3) Without limiting the matters that the court may take into account under subsection (1), it is to take into account:
- (a) the probative value of the evidence; and
 - (b) the importance of the evidence in the proceeding; and
 - (c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and
 - (d) the gravity of the impropriety or contravention; and
 - (e) whether the impropriety or contravention was deliberate or reckless; and
 - (f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights; and
 - (g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and
 - (h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.

Where it has been determined that the evidence was obtained improperly, the onus is on the party seeking to adduce the recording to show that *'the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained'*.

What are the Court's key considerations?

- The best interests of the child remain the paramount consideration in family law proceedings.⁴⁵
- The probative value of the evidence sought to be admitted must be weighed against the potential prejudicial effect to the other party.

Relevant Cases

In *Huffman & Gorman (No 2)*,⁴⁶ the Family Court considered s 138 of the *Evidence Act 1995* (Cth) and allowed recordings by the father of the mother to be admitted into evidence on the basis that there were serious allegations as to the safety of the children.

Following separation, the three young children of the parties lived with the mother and spent time with the father. The father sought orders that the children live with him and alleged that the mother's violent conduct had emotionally and psychologically harmed the children.

⁴⁵ *Family Law Act 1975* (Cth), section 60CA.

⁴⁶ [2014] FamCA 1077.

The father tape recorded conversations between himself and the mother, without the mother's knowledge and consent, and sought that the recordings be admitted into evidence. The father argued that, even if the recordings were prima facie inadmissible, the court should exercise its discretion to admit them. The mother objected on the basis that the evidence was unlawfully obtained and was inadmissible.

In allowing the recordings to be admitted into evidence, Justice Hannam stated [at 44]: *"the desirability of admitting evidence of family violence in a hearing where the best interests of children are paramount outweighs the undesirability of admitting evidence which was obtained unlawfully"*.

In *Masri & Masri*,⁴⁷ Justice Hannam refused to admit evidence sought to be admitted under section 138. In that case, both parents sought to tender recordings which each claimed showed evidence in respect to family violence. Her Honour considered that the mother's concerns about the father's anger management issues and parenting capacity:

*"cannot be of great significance when she proposes that the parties equally share parental responsibility for the children and that the children spend substantial and significant time with their father. She also does not seek an order restraining physical discipline in her final parenting proposal."*⁴⁸

Justice Hannam went on to say that, unlike the Full Court's decision in *Gorman & Huffman and Anor* ⁴⁹(dealing with the appeal from Her Honour's judgment referred to above), in which family violence of a very serious type was a pivotal issue in the case and therefore formed the basis for admitting recordings which were allegedly illegally obtained, in the present case the recordings went to minor issues, or issues in which the facts were not in contention. Accordingly, the probative value of the recordings did not outweigh the undesirability to admitting such illegally obtained evidence.

In *Broughton & Broughton*,⁵⁰ the Full Court (per Strickland, Aldridge and Gill JJ) found that because the husband's recordings of his conversations with the children and with the wife were relevant to family violence and his recordings of the children identified *"the emotional impact of the change of arrangements"*,⁵¹ they were prima facie admissible. However, the Full Court found that the recordings had little probative value given the husband's evidence already contained summaries of the recordings. The trial judge's rejection of the recordings therefore likely did not constitute a material error.⁵²

It was also relevant to the decision that the husband did not seek to tender the recordings until the final hearing, when the wife was unable to respond, and was unable to be cross-examined on the material. The prejudice to the wife was therefore not outweighed by the probative value of the recordings.

In *Coulter & Coulter*,⁵³ Judge Heffernan determined that it was *"improper of the mother to make secret audio recordings of private conversations between the father and the*

⁴⁷ [2017] FamCA 539.

⁴⁸ Ibid, at [29].

⁴⁹ [2016] FamCAFC 174.

⁵⁰ [2018] FamCAFC 96.

⁵¹ Ibid, at [45].

⁵² Ibid, at [44].

⁵³ *Coulter & Coulter (No.2)* [2019] FCCA 1290.

children"⁵⁴ but "not improper for the mother to make the video recordings of the two handovers".⁵⁵

His Honour considered the mother to have a legitimate interest in the safety of herself and the children at changeovers where there was a history of family violence, and where there was evidence of the mother seeking a family violence intervention order through the state courts, contemporaneously with making the recording. However, the same did not apply to the audio recordings of conversations between the mother and the children as the children were entitled to privacy in those conversations.

In *Shelbourne & Shelbourne*,⁵⁶ Justice Rees highlighted that, in respect to tendering illegally obtained recordings:

There will always be a degree of unfairness to one party where there is no opportunity to cross-examine the other in relation to the evidence, but these are interim proceedings relating to the welfare of children and the evidence is relevant to serious allegations that bear on the welfare of the children. I consider that the importance of the evidence, in assisting in the determination of the proper parenting arrangements for the children, outweighs any potential prejudice to the mother arising from the inability to cross-examine at this stage of the proceedings.⁵⁷

In *Giunta & Giunta (No 2)*,⁵⁸ McClelland DCJ considered the mother's objections to the father's recording of a conversation between the parties and to the corresponding paragraph in the father's Affidavit that transcribed part of the affidavit. The proceedings were in respect to the parties' property interests and parenting orders that concerned their two children and a child from the father's previous relationship that lived in the former matrimonial home with the father. While his Honour was not satisfied that the recording protected a lawful interest, as it was 'not necessary to "resist an allegation of crime"',⁵⁹ his Honour nevertheless allowed the totality of transcribed conversation to be admitted. His Honour 'accept[ed] the strength of the submission made by the Independent Children's Lawyer',⁶⁰ whereby the context of the recording is:

...relevant to the Court's consideration as to the extent of which the mother did or did not assist in respect to her parental responsibilities of W. The content potentially goes to the issue of parenting capacity generally.⁶¹

Section 128 Certificate: Self-Incriminating Evidence

In seeking to rely on evidence illegally or improperly obtained, it may be appropriate to seek a certificate to prevent that evidence later being used against your client. The Court may grant a certificate under section 128 of the *Evidence Act 1995* (Cth) which provides:

⁵⁴ Ibid, at [11].

⁵⁵ Ibid, at [10].

⁵⁶ Above n 3.

⁵⁷ Ibid at [40].

⁵⁸ Above n 39.

⁵⁹ Ibid at [8].

⁶⁰ Ibid at [9].

⁶¹ Ibid.

- (1) This section applies if a witness objects to giving particular evidence, or evidence on a particular matter, on the ground that the evidence may tend to prove that the witness:
 - (a) has committed an offence against or arising under an Australian law or a law of a foreign country; or
 - (b) is liable to a civil penalty.
- (2) The court must determine whether or not there are reasonable grounds for the objection.
- (3) Subject to subsection (4), if the court determines that there are reasonable grounds for the objection, the court is not to require the witness to give the evidence, and is to inform the witness:
 - (a) that the witness need not give the evidence unless required by the court to do so under subsection (4);
 - (b) that the court will give a certificate under this section if:
 - (i) the witness willingly gives the evidence without being required to do so under subsection (4); or
 - (ii) the witness gives the evidence after being required to do so under subsection (4); and
 - (c) of the effect of such a certificate.

In *Ferrall & Blyton* (2000) FLC 93-054, the Full Court (Nicholson CJ, Lindenmayer and Kay JJ) held that the availability of a certificate is not limited to cross examination and “clearly applies to evidence given in chief”. The Full Court went to say that where evidence in chief in family law proceedings is usually by way of affidavit, an “objection” in the sense required by s 128, was met by the husband indicating he would not file the affidavit unless a certificate was given. The decision in *Ferrall* was followed by the Full Court (Finn, Strickland & MacMillan JJ) in *Jarvis & Pike*,⁶² and remains good law despite the High Court’s obiter in *Cornwell v The Queen* (2007) 231 CLR 260.⁶³

The granting of a s 128 certificate with respect to audio recordings in family law proceedings was considered by Berman J in *Garner & Garner*.⁶⁴ In that matter, Berman J did not consider it appropriate to issue a certificate in respect of the audio recordings or the affidavit material as the father had withdrawn his objection and the evidence was already admitted.⁶⁵

Justice Berman cited Einstein J in the decision of *Meiko Australia Pacific Pty Ltd v Hinchcliff* [2009] NSWSC 354 and said:

184. The terms of s 128 clearly contemplate the certificate, if granted, is granted prior to the giving of evidence not to evidence which has already been given, particularly where no objection was taken.

⁶² [2013] FamCAFC 196.

⁶³ In *Cornwell v The Queen*, the High Court expressed doubt (but ultimately did not decide the matter) as to whether a witness in criminal proceedings could object to giving evidence in chief that they were seeking to adduce themselves.

⁶⁴ [2016] FamCA 630.

⁶⁵ *Ibid*, at [133]-[136].

185. To the extent that a certificate can be issued after the giving of evidence, this may occur where the court has ruled but not granted a certificate: *Cornwell v R* [2006] NSWCCA 116 at [87]- [94]. The certificate in that proceeding concerned answers concerning specific matters in cross examination.

186. A retroactive application of s 128 is unwieldy and is not contemplated by that section. It also undermines the purpose of this section, which is to prevent witnesses from being coerced into giving evidence which tends to incriminate them. Once the evidence has been given, it cannot be said that the witness has been compelled.

Parties have a duty under Rule 6.05 of the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* to make full and frank disclosure of all information relevant to a parenting case. This may well capture recordings.⁶⁶ Given this is now more explicit than under the previous Rules, practitioners should consider making this plain to clients at the outset of their retainer. If the circumstances of the case allow, practitioners ought also consider whether their client should make an application for a s 128 certificate during pre-trial proceedings.

A matter of weight, and unintended consequences

Admission of evidence does not guarantee it will be given weight. This is particularly so when the recording (or parts of it) is indistinct, or when it is impossible to definitively identify the participants to the conversation, or where parts (or all) of it are not in English and there is a dispute as to the meaning of what is said.

In *Gorman & Huffman and Anor*, the Full Court noted that:

There are also complaints made by the mother that “the extracts and or tape recordings were reconstructed”, and that the conversations chosen were “staged”, but once again these complaints are misconceived. They do not go to the question of admissibility, and they can only go to the weight to be attached to the evidence once admitted.⁶⁷

Likewise, in *Gawley & Bass*, Judge Baker admitted recordings but stated that “*the weight which can be given to the evidence is another issue*”.⁶⁸

In *Jasper & Corrigan (No 2)*, Judge Altobelli also made this distinction explicit:

What needs to be made very clear to all parties in this case, and perhaps especially to the Applicant, is this: all the Court is ruling on is admissibility of evidence. It is not ruling on the weight that will be given to evidence. Evidence might be admissible, but it might not receive much weight.⁶⁹

Indeed, the judge may form the view the recordings reflect poorly on the maker. Such material could lead them to the conclusion that the maker is manipulative, were

⁶⁶ See for example, *Newitt & Falcone* [2012] FamCA 1015, under the previous Rules, where Justice Cronin ordered the husband to produce covert recordings to the wife.

⁶⁷ [2016] FamCAFC 174, at [20].

⁶⁸ Above n 21, at [57].

⁶⁹ Above n 23, at [23].

deliberately provocative towards the recorded party, and that their actions are not child focussed. In the matter of *Guzniczak & Rogala*,⁷⁰ Benjamin J admitted the recordings, but placed little weight on them:

...given the husband's propensity to exaggerate and his approach in collecting, saving and recording evidence for possible family law proceedings, I have treated these with a degree of caution.⁷¹

His Honour drew negative conclusions about the maker and made a finding that the husband was 'baiting the wife'⁷² and referred to such behaviour as 'theatrical and manipulative'⁷³.

Alternatively, as in the matter of *Masri & Masri*,⁷⁴ the recordings may go to an issue of little importance, or where the facts are largely uncontested. This is an issue to give consideration to, given the significant hearing time that may be consumed in arguments over admissibility of recordings.

Objecting to the admission of covert recordings

As covered above, where the recording has been made by a party to a conversation, in NSW, SA, ACT, WA or Tasmania, recordings may still be lawful if the recording was "reasonably necessary" to protect the "lawful interest" of the party making the recording. Objections can be taken on the basis that one, or both, limbs of that part of the test are not made out.

However, even if the recordings are lawful (because it is not a breach of the general prohibition, or falls under an exception), it is open for the responding party to seek that the Court exercise discretion to exclude the evidence under s 135 of the *Evidence Act 1995* (Cth) which relevantly provides:

The court may refuse to admit evidence if its probative value⁷⁵ is substantially outweighed by the danger that the evidence might:

- (a) be unfairly prejudicial to a party; or
- (b) be misleading or confusing; or
- (c) cause or result in undue waste of time.

Unlike in proceedings involving a jury, it may be difficult to convince a judicial officer that they will be unfairly prejudiced, misled, or confused! For that reason, s 135(c) is the most commonly relied on subsection in civil proceedings. However, unfair prejudice may arise in civil proceedings in the form of procedural unfairness, where a party is unable to properly consider and respond to evidence.

⁷⁰ [2017] FamCA 758.

⁷¹ Ibid, at [417].

⁷² Ibid, at [108].

⁷³ Ibid, at [107].

⁷⁴ [2017] FamCA 539.

⁷⁵ Probative value is defined in the Dictionary as "the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue".

It was noted by Rees J in *Shelbourne & Shelbourne* that "evidence is not unfairly prejudicial merely because it tends to damage the case of the mother and support the case of the father."⁷⁶

In that matter, Rees J admitted the evidence having considered that the serious allegations of family violence and interim nature of proceedings outweighed any 'potential prejudice to the mother arising from the inability to cross-examine'⁷⁷ event though the recordings did 'not show the whole of the incident between her and the father on each occasion and that they [did] not show how the incident started'.⁷⁸

As set out above, objections may also be taken on the basis that the evidence is illegal under the relevant State or Territory legislation, does not satisfy s 138 of the Evidence Act, and should be excluded under s 135 of the Evidence Act.

Recordings made by children

Generally, the Court is critical of parties that involve children in the proceedings. Unsurprisingly, this encompasses involving children in making recordings, for the purpose of a party obtaining an advantage in the proceedings.

In *Callahan & Callahan*,⁷⁹ the father sought to adduce a recording of a telephone call between the mother and the child. The mother was unaware the call was being recorded. The recording was in breach of the *Surveillance Devices Act 2007* (NSW). The Court was not satisfied that the probative value of the evidence outweighed the undesirability of admitting evidence that was obtained by causing a child to record a conversation with the mother, and pass it on to the mother. The Court stated "[i]t is not desirable to encourage or even condone a child taking a partisan attitude to proceedings between his parents."⁸⁰

The Court expressed similar concerns in *Alexander & Turner*,⁸¹ in which a teenage child recorded her father and step-mother without their knowledge. The child later gave a copy of the recording to the mother, who sought to tender same in contravention proceedings against the father. In that matter, the Court said "[i]f the evidence is admitted, that could be seen as condoning a child secretly recording a parent and the other parent using it to file a contravention application."⁸²

There may be occasions in which it is appropriate to tender a recording made by a child (such as in *DW v R*), however, very careful consideration to the probative value of the recording, as against the Court's general disapproval of children's involvement in proceedings, ought be given before tendering any such recording.

Additional Considerations: Family Violence

As is obvious from the case law, many covert recordings are made in the context of family violence. Victims of family violence, who feel unable to escape the relationship at that time, may use covert recordings because they thought "no one would believe my word

⁷⁶ Above n 3, at [38].

⁷⁷ Ibid, at [40].

⁷⁸ Ibid, at [62].

⁷⁹ [2014] FCCA 2930.

⁸⁰ Ibid, at [68].

⁸¹ [2015] FCCA 3197.

⁸² Ibid, at [65].

alone and that I needed to have proof.⁸³ Both the Family Law Court and Criminal Courts see a clear place for recordings by victims of violence, in protecting the lawful interests of the victims - or, as highlighted in *Gawley & Bass*, the children of a relationship.

The matter of *Janssen & Janssen*⁸⁴ highlights this. Justice McClelland admitted into evidence recordings made by the mother, which were alleged to support the mother's claims of family violence. His Honour found that the recordings fell within the exception in section 7(3)(b)(i) of the *Surveillance Devices Act 2007* (NSW), where the mother had a lawful interest in showing the father may be charming in public but violent behind closed doors. His Honour went on to say that if the recordings did not fall within the exception, he would admit the evidence under s 138 of the *Evidence Act 1995* (Cth), due to the potential difficulty of obtaining evidence of alleged family violence when it occurs behind closed doors without any witnesses being present other than the alleged perpetrator and victim.

However, notwithstanding the Court's willingness to admit covert recordings either on the basis of the statutory exception, or under s 138 *Evidence Act 1995* (Cth), significant caution needs to be exercised before advising clients to record with impunity. In particular, we pause to note that legal practitioners ought to strongly discourage clients from undertaking activities that amounts to the commission of a crime.

In cases where there is a Domestic or Family Violence Order ("DFVO") in place, the recording of the protected party by the party restricted by the Order may well constitute a breach of the DFVO, or may constitute stalking. Consideration should be given to the potential for criminal charges should a client who is under the conditions of a DFVO consider recording the other party, for example at changeover, as a form of protection.

Practical Tips and Tricks - Summary

Do

- Seek a certificate under section 128 of the Evidence Act as early as possible if you intend to adduce recordings made by your client which may fall foul of the relevant state laws.
- Confirm date, time and place of recordings - place the event recorded in the factual matrix. Set this information out in your client's affidavit material (subject to section 128 considerations).
- Confirm whether the recording was inadvertent or deliberate, whether the conversation was private, and whether the participants consented (expressly or implicitly) to the recording.
- Consider whether the recordings have probative value, and go towards a significant issue at hearing.
- Consider whether the recordings make the case you/your client want to make.
- Subject to section 128 considerations, advise the other side in advance of any recordings you intend to rely upon at a hearing.
- Consider your client's obligation to disclose recordings - this will extend to recordings which are both of assistance to your client's case, and detrimental.
- Advise the Court well in advance of the hearing (whenever possible) that your client intends to tender recordings. It may be worth including a reference to this in your client's affidavit material (subject to any section 128 considerations), where there is no provision to annex or exhibit recordings.

⁸³ *R v Coutts* [2013] SADC 50, at [5].

⁸⁴ [2016] FamCA 345.

- Make arrangements to have the necessary technology available to play the recordings – it is prudent to bring your own device, out of abundant caution. Consider whether sound quality on your device will be problematic- consider a small, portable Bluetooth speaker as a possible alternative.
- Raise the question of admissibility before evidence is given.⁸⁵
- Give your client advice about recordings potentially being a breach of a DFVO.

- *Don't* Do not submit that illegally obtained evidence should be admitted in order to demonstrate unacceptable risk to the children/evidence of family violence and simultaneously propose equal shared parental responsibility, and the children spend substantial and significant time with the other party.⁸⁶
- Do not permit clients to sit on evidence within their knowledge that they intend to later use, particularly in light of the new Rules.⁸⁷
- Do not encourage the making of covert recordings as a matter of course.

⁸⁵ *Broughton & Broughton* [2018] FamCAFC 96 at [47]; *Jasper & Corrigan (No 2)* [2017] FCCA 1467 at [5].

⁸⁶ Above n 51, at [29]; above n 48 [33].

⁸⁷ Above n 50, at [39].