Hear today, gone tomorrow – listening devices revisited

Julie Eisenberg reviews the law regarding listening devices

Tony Packard's recent brush with the law has focused public attention on the illegal use of listening devices. In Packard's case, it was alleged that the information obtained by bugging rooms in which potential buyers discussed the course of negotiations was used to gain insight into customer intentions.

While this raises particular ethical considerations for business, from a strict legal perspective this activity is no different to the use of listening devices by the media to obtain information for the purpose of widespread publication. Media organisations face the additional consequence when they communicate such information to a mass market of being liable not only for the act of listening but also for publication.

The policy behind the legislative prohibition of recording and using private conversations is to protect people from "unjustified invasions of privacy". There is presently no overriding privacy legislation which regulates these rights. This leads to the interesting result that while there are legislative limitations on the use of listening devices, there is no corresponding regulation of visual recordings made without the subject's consent.

The recording and communication of private conversations is regulated by both State and Commonwealth legislation, the latter dealing specifically and exclusively with the interception of telecommunications. The State Acts more generally cover the use of listening devices. The New South Wales *Listening Devices Act 1984* ("the Act") is used to illustrate this discussion, but the particular provisions vary from State to State.

As a general observation, there is no recognised right of the media to overhear or record private conversations without the consent of those involved. By limiting the legislative exceptions largely to situations where an "eavesdropper" has a specific lawful interest, the legislature has underlined a policy reflected in the words of the NSW Attorney-General in his second reading speech for the New South Wales legislation:

"Electronic aids add a wholly new dimension to eavesdropping. They make it more penetrating, more indiscriminate and more obnoxious to a truly free society. People should not be expected to live in fear that every word they speak may be transmitted or recorded and later repeated to the entire world."

Unlawful use of listening devices

In general terms, the *Listening Devices Act* makes it unlawful, in the absence of a relevant consent, to:

- use or cause to be used a listening device to record certain private conversations (section 5(1));
- communicate or publish certain private conversations which have been unlawfully listened to (section 6(1));
- communicate or publish certain private conversations to which a person has been a party, whether or not the use of listening device was unlawful under section 5 (section 7(1)); or
- be in possession of a record of a private conversation knowing that it has been obtained in contravention of section 5 (section 8(1)).

A breach of any of these provisions is a criminal offence which may attract fines, imprisonment or both.

Subject to some exceptions (which are discussed below), section 5(1) of the Act contains a blanket prohibition on the use of a listening device to **record** private conversations, whether or not the person using the device is a party to the conversation. The section also prohibits the use of a device to **listen** to a conversation to which the person is not a party.

There are comparable provisions in Tasmania, the ACT and South Australia. However, in Queensland, Victoria, Western Australia and the Northern Territory there is no prohibition on taping a conversation to which the person is a party (the offence occurs, rather, when the substance of the conversation is published without consent).

The first element of the offence is the **use** of the listening device. The NSW legislation defines a listening device as "any instrument, apparatus, equipment or device capable of being used to record or listen to a private conversation simultaneously with its taking place."

In *Miller* v *TCN Channel Nine*, a 1988 decision, one person had a microphone hidden on her and another was outside the room operating the recording equipment. Both were found to have "used" the listening device even though its listening and recording functions were physically separated.

Private conversations

The second element is the recording or listening to the private conversation. In New South Wales, a "private conversation" is defined 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 those persons to do so".

Given the policy basis of the legislation, the courts are likely to take a fairly strict view of what amounts to a "private conversation" and avoid strained and technical approaches. In *Miller*, a reporter posing as a model to investigate the activities of a theatrical/modelling agency secretly recorded conversations with agency personnel. The court found, among other things, that a

conversation does not cease to be private even though there is an open door to the room which could enable a conversation to be heard if a person walked past the door.

The definition of "private conversation" varies from State to State. For example, the Queensland *Invasion of Privacy Act* specifically excludes "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".

The narrower New South Wales definition of "private conversation" is similar to the definition used in Tasmania, South Australia and the Australian Capital Territory. The broader Queensland version has similarities to the definitions used in the Victorian, Western Australian and Northern Territory legislation.

Exceptions to section 5

Where a person has used a listening device to listen to or record a private conversation, they may still escape prosecution if they fall within one of the exceptions set out in sections 5(2) and 5(3). Many of the exceptions will not be available to members of the media. For example, section 5(2)(c) allows the use of a listening device to obtain evidence or information in connection with an imminent threat of serious violence to persons or of substantial damage to property or in connection with a serious narcotics offence, if it is necessary to use the device immediately to obtain that evidence or information.

There are further exceptions under section 5(3) where:

(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:

(i) the recording of the conversation is reasonably necessary for the protection of the lawful interests of that principal party; or

(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.

Subsection (b)(ii) clearly excludes media defendants, which means that journalists using listening devices are in most cases legally compelled to disclose the fact that they are using them. It was made clear in *Miller* that while obtaining consent subsequently may diminish the likelihood of prosecution and potentially reduce penalty, it does not change the fact that an offence has been committed when the listening is done or the recording obtained without consent.

Publication of information

The statutory prohibitions on publication of information obtained through the use of a listening device apply whether or not the conversation was lawfully listened to in the first place. Where the conversation was unlawfully listened to, section 6(1) operates to prohibit a person knowingly communicating or publishing the conversation, or a report of it, that has come to the person's knowledge, as a result, directly or indirectly, of the use of a listening device in contravention of section 5.

Section 7(1) of the New South Wales legislation prohibits publication of a record of a conversation where the conversation was recorded by a party (whether or not in contravention of section 5). There are exceptions in both situations including where consent of all principal parties is obtained. However, as in the case of the exceptions to the "use" offence, most of the "non-consent" exceptions are of limited application to people in the media who wish to publish such conversations.

However, under section 6(2)(c), where a person has obtained knowledge of a private conversation from a source other than the unlawful recording, they are not prohibited from publishing that infomration even though they may also be aware of the contents of the unlawful recording.

Some of the other States provide for an exception where a party communicates the information in the recording in pursuance of a duty or to protect its lawful interests. Again, these provisions offer little comfort to the media in the ordinary course.

In New South Wales, Tasmania and the Australian Capital Territory it is an offence to be in possession of a record of a private conversation knowing that it has been obtained, directly or indirectly by the unlawful use of a listening device unless, among other things, all principal parties to the conversation consent. The Western Australian and Victorian legislation contain a provision compelling destruction of illegal recordings and prescribing penalties when this is not done promptly.

Who is responsible?

Any of the parties connected with, or responsible for the obtaining of the recording or listening to the conversation could potentially be committing an offence. This could include the journalist or person who uses the device, the program producer, production company, presenter and broadcaster. Additionally, their legal advisers could be liable for the offence of possession of an illegal recording.

For example, in *Miller*, it was submitted to the court that the television station, not the production company which sold the program containing the secret recording to the television station, was the party responsible for transmitting the program to the public. The court rejected this and found that the production company "took an active part in transmitting that program to the public". This was sufficient to make out the offence. In such a situation, more than one party could be found to bear the responsibility for committing an offence (although in this case, charges against the licensee were dismissed on other grounds).

The NSW legislation also deems each director of a corporation responsible for a corporation's conduct in committing an offence unless they fall within certain specified exceptions, including lack of knowledge of the contravention, inability to influence the conduct of the corporation or using all due diligence to prevent contravention.

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World Review

A survey of some recent international developments

British Telecom and MCI Communications have announced that they have formed an alliance to provide worldwide value added telecommunications services.

• In order to stimulate the development of Russia's domestic telecommunications infrastructure, the Russian Ministry of Communications has announced that it is postponing the issue of licences to develop international communications systems.

• Nine Asian carriers have signed a Memorandum of Understanding to build the Asia Pacific Cable Network – cable which will link Singapore with 8 other Asian nations. It is envisaged that the fibre link will be over ten thousand kilometres.

• Telstra's hopes of operating a second general carrier licence in Malaysia have been thwarted by the Malaysian Government's decision ruling out full deregulation of their telecommunications industry.

• The German Government has revealed plans to privatise Deutsche Bundepost Telekom and its related postal companies, whilst the French Government has also announced that France Telecom will be privatised and the country's telecommunications sector will undergo a major overhaul.

World Review was prepared by John Mackay of Blake Dawson Waldron.

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is not quite that simple. I believe that while these countries feel their way towards a free society, we need to take this concept of balance into account. Sometimes broadcasters will make exactly the same choice they would have made in Australia, Britain or the USA. But every now and then they may feel that reality is literally millions of people working desperately hard to pull themselves up by their own bootstraps and hesitate to set fire to their world.

Indonesia has surprised me by its sheer diversity. Secessionism is not abnormal – it is endemic. And I sometimes wonder how anyone can run the place at all. Another surprise has been how fiercely proud ordinary Indonesians are of their nation. We won our independence too easily to care so deeply.

Conclusion

As a codicil to all this, let me anticipate some reactions and say that I am not suggesting that existing regimes should be sacrosanct. Nor am I saying that governments should be encouraged to tell broadcasters what to say and how to say it. This is not a disguised plea for censorship. But I do feel that the more we understand our neighbours, the less comfortable we will be with "publish and be damned". That might just turn out to be prophetic.

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information is true. The Government agreed for the above reasons and this became the test in the Act.

The second point is a little more subtle. The Commissioner for Equal Opportunity commented that the requirement that the person genuinely believe that the information is true created an unfair distinction. The distinction is best put as follows:

> *"As a matter of fairness it would seem to me that the Act ought to protect the fair-minded and objective person, who is unable to make up his or her own mind about the truth of the allegations, to the same extent as it protects the person who rashly accepts and believes everything he or she hears."*

This point was accepted. Accordingly, the test of belief on reasonable grounds is supplemented by an alternative as follows:

> *"... is not in a position to form a belief on reasonable grounds about the truth of the information but believes on reasonable grounds that the information may be true and is of sufficient significance to justify its disclosure so that its truth may be investigated."*

It will, of course, be necessary for a public awareness campaign to educate the public about the legislation. I look forward to co-operating with all concerned parties in that process.

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Prosecutions

The New South Wales legislation provides for a two year limitation period in which proceedings are to be commenced. The written consent of the Attorney General is required before proceedings can be instituted.

Most of the State Acts provide for fines or imprisonment or both as penalty for breach of the provisions discussed above. In New South Wales, the maximum fines range between $4,000 and $10,000 for individuals, depending on whether the conviction is summary or on indictment and $50,000 for corporations. The maximum sentences range from 2 to 5 years.

In *Miller's* case, which was decided in 1988 under the New South Wales legislation, the journalist was fined $500 after the court took into account her character, her belief (based on legal advice given to her employer) that she was not breaking the law and the fact that the legislation was relatively new. This penalty was upheld on appeal in *Donaldson v TCN Channel Nine* in 1989. The production company was fined a total of $25,000 for the offences of causing the use of a listening device, possessing the tape recording of the conversation and communicating it to viewers.

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