



TASMANIA

LISTENING DEVICES ACT 1991

No. 21 of 1991

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LISTENING DEVICES ACT 1991

No. 21 of 1991

AN ACT to regulate the use of certain devices capable of being used for listening to private conversations

[Royal Assent 31 July 1991]

BE it enacted by His Excellency the Governor of Tasmania, by and with the advice and consent of the Legislative Council and House of Assembly, in Parliament assembled, as follows:—

PART 1

PRELIMINARY

Short title

1—This Act may be cited as the *Listening Devices Act 1991*.

Commencement

2—This Act commences on a day to be proclaimed.

Interpretation

3—(1) In this Act, unless the contrary intention appears—

“**listen to**” includes hear;

“**listening device**” means any instrument, apparatus, equipment or device capable of being used to record or listen to a private conversation simultaneously with its taking place;

“**party**”, in relation to a private conversation, means—

(a) a person by or to whom words are spoken in the course of the conversation; or

(b) a person who, with the consent, express or implied, of any of the persons by or to whom words are spoken in the course of the conversation, records or listens to those words;

“**the police force**” has the meaning assigned to that expression by section 5 of the *Police Regulation Act 1898*;

“**principal party**”, in relation to a private conversation, means a person by or to whom words are spoken in the course of the conversation;

“**private conversation**” means 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;

“**regulations**” means the regulations made and in force under this Act;

“**serious narcotics offence**” means an offence under section 45, section 46, section 47 (1) or (3) or section 55 of the *Poisons Act 1971*, but does not include an offence which is declared by the regulations not to be a serious narcotics offence within the meaning of this Act.

(2) A reference in this Act to a listening device does not include a reference to a hearing aid or similar device used by a person with impaired hearing to overcome the impairment and to permit the person to hear only sounds ordinarily audible to the human ear.

- (3) A reference in this Act to—
- (a) a report of a private conversation includes a reference to a report of the substance, meaning or purport of the conversation; or
 - (b) a record of a private conversation includes a reference to a statement prepared from such a record.

Act to bind the Crown

4—This Act binds the Crown, not only in right of Tasmania but also, so far as the legislative power of Parliament permits, binds the Crown in all its other capacities.

PART 2

OFFENCES RELATING TO LISTENING DEVICES

Prohibition on use of listening devices

5—(1) A person shall not use, or cause or permit to be used, a listening device—

- (a) to record 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.

(2) Subsection (1) does not apply to—

- (a) the use of a listening device pursuant to a warrant granted under Part 4; or
- (b) the use of a listening device pursuant to an authority granted by or under the *Telecommunications (Interception) Act 1979* of the Commonwealth or any other law of the Commonwealth; or
- (c) the use of a listening device to obtain evidence or information in connection with—
 - (i) an imminent threat of serious violence to persons or of substantial damage to property; or

(ii) a serious narcotics offence—

if the person using the listening device believes on reasonable grounds that it was necessary to use the device immediately to obtain that evidence or information; or

(d) the unintentional hearing of a private conversation by means of a listening device; or

(e) the use of a listening device for the recording of an interview between a member of the police force and a person suspected by a member of the police force of having committed an offence against any Act.

(3) Subsection (1) (b) does not apply to the use of a listening device by a party to a private conversation if—

(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.

(4) Where a listening device is used in the circumstances referred to in subsection (2) (c) and its use would, but for subsection (2) (c), be contrary to this section, the person who used the device shall, within 3 days after first using the device, furnish a report to the Chief Magistrate containing particulars of the circumstances in which the device is being, or was, used.

(5) If, on receipt of a report referred to in subsection (4), the Chief Magistrate is not satisfied that the use of the listening device was justified under subsection (2) (c), the Chief Magistrate shall order that the use of the device immediately cease.

(6) Where the Chief Magistrate has ordered that the use of a listening device cease, a person shall not use the listening device after such an order is made unless it is used pursuant to a warrant granted under Part 4.

(7) If, on receipt of a report referred to in subsection (4), the Chief Magistrate is satisfied that the use of the listening device was justified under subsection (2) (c), the Chief Magistrate shall so notify the person using the device and that person shall, within one month after the device ceases to be used, furnish a report in writing to the Chief Magistrate—

- (a) specifying the name, if known, of any person whose private conversation was recorded or listened to by the use of the device; and
- (b) specifying the period during which the device was used; and
- (c) containing particulars of any premises on which the device was installed or any place at which the device was used; and
- (d) containing particulars of the general use made or to be made of any evidence or information obtained by the use of the device.

Power of Chief Magistrate to require subject to be informed of surveillance

6—(1) Where the Chief Magistrate, on receipt of a report referred to in section 5 (4), orders that the use of a listening device cease and a warrant under Part 4 in respect of the use of the listening device has not been granted, the Chief Magistrate may direct the person who used the listening device to supply to a person whose private conversation has been recorded or listened to, within a period specified by the Chief Magistrate, such information regarding the use of the device as the Chief Magistrate may specify.

(2) The Chief Magistrate shall not give a direction under subsection (1) unless satisfied that, having regard to the evidence or information obtained by the use of the listening device and to any other relevant matter, the use of the listening device was an unnecessary interference with the privacy of the person concerned.

(3) Before giving a direction under subsection (1), the Chief Magistrate shall give the person who used the listening device an opportunity to be heard in relation to the matter.

(4) A person to whom a direction is given under subsection (1) shall comply with the direction.

Penalty: Fine not exceeding 20 penalty units or imprisonment for a term not exceeding 12 months, or both.

Further power of Chief Magistrate to require subject to be informed of surveillance

7—On receipt of a report under section 5 (7), the Chief Magistrate may exercise the same powers as the Chief Magistrate may exercise under section 6 (1) and subsections (2), (3) and (4) of that section apply accordingly.

Report to Attorney-General

8—Where a listening device is used in circumstances referred to in section 5 (2) (c) and its use would, but for section 5 (2) (c), be contrary to that section, the person using the device shall, within one month, after the device ceases to be used, furnish a report in writing to the Attorney-General—

- (a) containing particulars of the circumstances in which the device was used; and
- (b) without affecting the generality of paragraph (a), containing the same particulars and specifying the same matters as are required by section 5 (7).

Prohibition on communication or publication of private conversations unlawfully listened to

9—(1) Where a private conversation has come to the knowledge of a person—

- (a) as a result, direct or indirect, of the use of a listening device in contravention of section 5; or
- (b) as a result of the unintentional hearing of such a conversation by means of a listening device—

that person shall not knowingly communicate or publish that conversation, or a report of that conversation, to any other person.

(2) Subsection (1) does not apply—

- (a) where the communication or publication is made—
 - (i) to a party to the private conversation; or
 - (ii) with the consent, express or implied, of all of the principal parties to the private conversation; or
 - (iii) in the course of proceedings for an offence against this Act; or

- (b) where the person making the communication or publication believes on reasonable grounds that it was necessary to make that communication or publication in connection with—
 - (i) an imminent threat of serious violence to persons or of substantial damage to property; or
 - (ii) a serious narcotics offence; or
- (c) to prevent a person who has obtained knowledge of the private conversation otherwise than in a manner referred to in that subsection from communicating or publishing to another person the knowledge so obtained by the person, notwithstanding that the person also obtained knowledge of the conversation in such a manner.

Prohibition on communication or publication of records of private conversations by parties thereto

10—(1) A person who has been a party to a private conversation and has used, or caused to be used, a listening device to record the conversation (whether in contravention of section 5 or not), shall not subsequently communicate or publish to any other person any record of the conversation made, directly or indirectly, by the use of the device.

(2) Subsection (1) does not apply where the communication or publication—

- (a) is made to another party to the private conversation or with the consent, express or implied, of all of the principal parties to the conversation; or
- (b) is made in the course of legal proceedings; or
- (c) is not more than is reasonably necessary for the protection of the lawful interests of the person making the communication or publication; or
- (d) is made to a person who has, or is, on reasonable grounds, by the person making the communication or publication, believed to have, such an interest in the private conversation as to make the communication or publication reasonable under the circumstances in which it is made; or

- (e) is made by a person who used the listening device to record the private conversation pursuant to a warrant granted under Part 4 or pursuant to an authority granted by or under the *Telecommunications (Interception) Act 1979* of the Commonwealth or any other law of the Commonwealth.

Possession of record of private conversation

11—(1) A person shall not possess a record of a private conversation knowing that it has been obtained—

- (a) directly or indirectly, by the use of a listening device in contravention of section 5; or
- (b) as the result of the unintentional hearing of a private conversation.

(2) Subsection (1) does not apply where the record is in the possession of the person—

- (a) in connection with proceedings for an offence against this Act; or
- (b) with the consent, express or implied, of all of the principal parties to the private conversation; or
- (c) as a consequence of a communication or publication of that record to that person in circumstances that do not constitute an offence against this Part.

Offence against this Part

12—A person who contravenes any provision of this Part for which no other penalty is specified is guilty of an offence and is liable on summary conviction—

- (a) except as provided in paragraph (b), to a fine not exceeding 40 penalty units or imprisonment for a term not exceeding 2 years, or both; or
 - (b) where the offence was committed by a corporation, to a fine not exceeding 500 penalty units.
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PART 3**ADMISSIBILITY OF EVIDENCE****Interpretation**

13—In this Part, a reference to the giving of evidence of a private conversation that has come to the knowledge of a person as a result of the use of a listening device includes a reference to the production of a record of such a private conversation.

Inadmissibility of evidence of private conversations when unlawfully obtained

14—(1) Where a private conversation has come to the knowledge of a person as a result, direct or indirect, of the use of a listening device in contravention of section 5—

- (a) evidence of the conversation; and
- (b) evidence obtained as a direct consequence of the conversation so coming to the knowledge of that person—

may not be given by that person in any proceedings before any court or person authorized to receive evidence.

(2) Where a private conversation has come to the knowledge of a person as a result, direct or indirect, of the use of a listening device pursuant to a warrant granted under Part 4 or in circumstances referred to in section 5 (2) (c)—

- (a) evidence of the conversation; and
- (b) evidence obtained as a direct consequence of the conversation so coming to the knowledge of that person—

may not be given by that person in any proceedings before any court or person authorized to receive evidence unless the reports required to be forwarded to the Chief Magistrate under section 5 (4) and (7) have been forwarded to the Chief Magistrate within the periods specified in those subsections and the report required to be furnished to the Attorney-General under section 8 has been forwarded to the Attorney-General within the period specified in that section.

(3) Subsections (1) and (2) do not render any evidence inadmissible—

- (a) if all of the principal parties to the private conversation concerned consent to the evidence being given; or

(b) if the private conversation concerned comes to the knowledge of the person called to give the evidence otherwise than in the manner referred to in those subsections, notwithstanding that the person also obtained knowledge of the conversation in such a manner; or

(c) in proceedings for an offence against this Act; or

(d) in proceedings for—

(i) an offence punishable by imprisonment for life or for 21 years; or

(ii) a serious narcotics offence—

if the court considers that the evidence should be admissible.

(4) In determining whether to admit evidence as referred to in subsection (3) (d), the court shall—

(a) be guided by the public interest, including where relevant the public interest in—

(i) upholding the law; and

(ii) protecting people from illegal or unfair treatment; and

(iii) punishing those guilty of offences; and

(b) have regard to all relevant matters, including—

(i) the seriousness of the offence in relation to which the evidence is sought to be admitted; and

(ii) the nature of the contravention of section 5 concerned.

(5) Any evidence, or any report of, or report of the substance, meaning, or purport of, any evidence in any proceedings referred to in subsection (3) (c) or (d) shall not be published without the leave of the court before which the proceedings are brought.

(6) Any person who contravenes subsection (5) is guilty of an offence and is liable on summary conviction to a fine not exceeding 20 penalty units or imprisonment for a term not exceeding 12 months, or both.

Admissibility of evidence of private conversation when obtained inadvertently pursuant to warrant

15—(1) Where a private conversation has inadvertently or unexpectedly come to the knowledge of a person as a result, direct or indirect, of the use of a listening device pursuant to a warrant granted under Part 4—

- (a) evidence of the conversation; or
- (b) evidence obtained as a consequence of the conversation so coming to the knowledge of that person—

may be given by that person in any criminal proceedings notwithstanding that the warrant was not granted for the purpose of allowing that evidence to be obtained.

(2) Subsection (1) does not render any evidence admissible if—

- (a) the evidence relates to an offence in respect of which a warrant could not be granted under Part 4; or
- (b) the complaint upon which the warrant was granted was not, in the opinion of the court, made in good faith.

PART 4

WARRANTS

Interpretation

16—In this Part—

“premises” includes vessels, vehicles and aircraft;

“prescribed offence” means—

- (a) an offence punishable on indictment; or
- (b) an offence not so punishable, being an offence of a class or description prescribed for the purposes of this Part.

Warrants authorizing use of listening devices

17—(1) Upon complaint made by a member of the police force of or above the rank of sergeant that the member of the police force suspects or believes—

- (a) that a prescribed offence has been, is about to be or is likely to be, committed; and
- (b) that, for the purpose of an investigation into that offence or of enabling evidence to be obtained of the commission of the offence or the identity of the offender, the use of a listening device is necessary—

a magistrate may, if satisfied that there are reasonable grounds for that suspicion or belief, authorize, by warrant, the use of the listening device.

(2) In determining whether a warrant should be granted under this section, a magistrate shall have regard to—

- (a) the nature of the prescribed offence in respect of which the warrant is sought; and
- (b) the extent to which the privacy of any person is likely to be affected; and
- (c) alternative means of obtaining the evidence or information sought to be obtained; and
- (d) the evidentiary value of any evidence sought to be obtained; and
- (e) any previous warrant sought or granted under this Part in connection with the same prescribed offence.

(3) Where a warrant granted by a magistrate under this section authorizes the installation of a listening device on any premises, the magistrate shall, by the warrant—

- (a) authorize and require the retrieval of the listening device; and
- (b) authorize entry onto those premises for the purpose of that installation and retrieval.

(4) A warrant granted by a magistrate under this section shall specify—

- (a) the prescribed offence in respect of which the warrant is granted; and
- (b) where practicable, the name of any person whose private conversation may be recorded or listened to by the use of a listening device pursuant to the warrant; and

- (c) the period (being a period not exceeding 60 days) during which the warrant is in force; and
- (d) where practicable, the premises on which a listening device is to be installed, or the place at which a listening device is to be used, pursuant to the warrant; and
- (e) any conditions subject to which premises may be entered, or a listening device may be used, pursuant to the warrant.

(5) A warrant granted under this section may be revoked by a magistrate at any time before the expiration of the period specified in the warrant pursuant to subsection (4) (c).

(6) Subsection (4) (c) shall not be construed as preventing the grant of a further warrant under this section in respect of a prescribed offence in respect of which a warrant has, or warrants have, previously been granted.

Radio/telephone warrants

18—(1) In this section, a reference to a telephone includes a reference to a radio or any other communication device.

(2) Upon complaint made by telephone by a member of the police force of or above the rank of sergeant that the member of the police force suspects or believes—

- (a) that a prescribed offence has been, is about to be or is likely to be, committed; and
- (b) that, for the purpose of an investigation into that offence or of enabling evidence to be obtained of the commission of the offence or the identity of the offender, the immediate use of a listening device is necessary—

a magistrate may, if satisfied that there are reasonable grounds for that suspicion or belief, authorize, by warrant, the use of the listening device.

(3) A magistrate shall not grant a warrant under this section authorizing the use of a listening device if the magistrate is satisfied that it would be practicable in the circumstances for a warrant to be granted under section 17 authorizing the use of that device.

(4) A complaint under this section may be made by a member of the police force by causing the complaint to be transmitted to a magistrate by another member of the police force.

(5) The fact that a complaint is made under this section by a member of the police force who causes the complaint to be transmitted to a magistrate by another member of the police force does not, if the magistrate is of the opinion that it is, in all the circumstances, impracticable to communicate directly with the member of the police force making the complaint, prevent the magistrate being satisfied as to the matters referred to in subsection (2).

(6) A magistrate grants a warrant under this section by stating the terms of the warrant.

(7) Where a magistrate grants a warrant under this section, the magistrate shall cause a record to be made in writing of—

- (a) the name of the member of the police force who was the complainant; and
- (b) where the complaint was transmitted by a member of the police force on behalf of the complainant, the name of the member of the police force who so transmitted the complaint; and
- (c) the details of the complaint; and
- (d) the terms of the warrant; and
- (e) the date and time the warrant was granted.

(8) The provisions of subsections (2) to (6) inclusive of section 17 apply to and in respect of a warrant granted under this section in the same way as those provisions apply to and in respect of a warrant granted under section 17, except that a reference in section 17 (4) (c), as so applied, to 60 days shall be read and construed as a reference to 24 hours.

Report to Attorney-General, &c.

19—A person to whom a warrant has been granted under this Part authorizing the use of a listening device shall, within 3 months after the warrant has ceased to be in force, furnish a report, in writing, to the Attorney-General and the Chief Magistrate—

- (a) stating whether or not a listening device was used pursuant to the warrant; and
- (b) if a listening device was so used—
 - (i) specifying the name, if known, of any person whose private conversation was recorded or listened to by the use of the device; and

- (ii) specifying the period during which the device was used; and
- (iii) containing particulars of any premises on which the device was installed or any place at which the device was used; and
- (iv) containing particulars of the general use made or to be made of any evidence or information obtained by the use of the device; and
- (v) containing particulars of any previous use of a listening device in connection with the prescribed offence in respect of which the warrant was granted.

Requirement to inform subject of surveillance

20—(1) Where, pursuant to a warrant granted under this Part, a listening device has been used to record or listen to the private conversation of a person, the Chief Magistrate may direct the person authorized to use the device to supply to a person whose private conversation has been recorded or listened to, within a period specified by the Chief Magistrate, such information regarding the warrant and the use of the device as the Chief Magistrate may specify.

(2) The Chief Magistrate shall not give a direction under subsection (1) unless satisfied that, having regard to the evidence or information obtained by the use of the listening device and to any other relevant matter, the use of the listening device was not justified and was an unnecessary interference with the privacy of the person concerned.

(3) Before giving a direction under subsection (1), the Chief Magistrate shall give the person to whom the warrant was granted an opportunity to be heard in relation to the matter.

(4) A person to whom a direction is given under subsection (1) shall comply with the direction.

Penalty: Fine not exceeding 20 penalty units or imprisonment for a term not exceeding 12 months, or both.

PART 5**MISCELLANEOUS****Destruction of irrelevant records made by the use of a listening device**

21—(1) This section applies to the use of a listening device—

- (a) pursuant to a warrant granted under Part 4; or
- (b) in the circumstances referred to in section 5 (2) (c).

(2) A person shall, as soon as practicable after it has been made, cause to be destroyed so much of any record, whether in writing or otherwise, of any evidence or information obtained by the person by the use of a listening device to which this section applies as does not relate directly or indirectly to the commission of a prescribed offence within the meaning of Part 4.

Penalty: Fine not exceeding 20 penalty units or imprisonment for a term not exceeding 12 months, or both.

Annual report by Attorney-General

22—The Attorney-General shall, as soon as practicable after 30 June in each year—

- (a) cause to be prepared a report—
 - (i) on the number of warrants sought under Part 4, and the number of warrants granted, in that year; and
 - (ii) on such other matters relating to the use of listening devices and to the administration of this Act as the Attorney-General considers appropriate; and
- (b) lay the report or cause it to be laid before both Houses of Parliament.

Time for instituting proceedings for certain offences

23—Proceedings for an offence against Part 2 may be commenced within a period of 2 years after the act or omission alleged to constitute the offence.

Consent of Director of Public Prosecutions

24—(1) Proceedings for an offence against this Act shall not be instituted without the written consent of the Director of Public Prosecutions.

(2) In proceedings referred to in subsection (1), a consent to institute the proceedings, purporting to have been signed by the Director of Public Prosecutions, shall be evidence of that consent without proof of the signature of the Director of Public Prosecutions.

Offences by corporations

25—(1) Where a corporation contravenes, whether by act or omission, any provision of this Act, each person who is a director of the corporation or who is concerned in the management of the corporation shall be deemed to have contravened the same provision unless the person satisfies the court that—

- (a) the corporation contravened the provision without the knowledge of the person; or
- (b) the person was not in a position to influence the conduct of the corporation in relation to its contravention of the provision; or
- (c) the person, being in such a position, used all due diligence to prevent the contravention by the corporation.

(2) A person may be proceeded against and convicted under a provision pursuant to subsection (1) whether or not the corporation has been proceeded against or been convicted under that provision.

(3) Nothing in subsection (1) prejudices or affects any liability imposed by a provision of this Act on any corporation by which an offence against the provision is actually committed.

Orders for forfeiture

26—(1) Where a court has convicted a person of an offence against this Act, it may, in addition to any penalty it may impose, make either or both of the following orders:—

- (a) an order that any listening device used in the commission of the offence be forfeited to the Crown or destroyed;

- (b) an order that any record of a private conversation—
 - (i) to which the offence relates; or
 - (ii) which was obtained by the use of a listening device to which the offence relates—be forfeited to the Crown or destroyed.

(2) Before making an order under subsection (1), the court may require notice to be given to, and may hear, such persons as the court thinks fit.

(3) Without affecting any other right of appeal, an order under subsection (1) may be appealed against in the same manner as if it were, or were part of, a sentence imposed in respect of the offence.

(4) Where an order is made under subsection (1) that a listening device or record be forfeited to the Crown or destroyed, any member of the police force may seize the listening device or record for the purpose of giving effect to the order.

Regulations

27—(1) The Governor may make regulations for the purposes of this Act.

(2) Without affecting the generality of subsection (1), regulations may be made for or with respect to warrants granted under Part 4 and proceedings under that Part in connection with any such warrants.

(3) Regulations under this section—

- (a) may be made subject to such conditions, or be made so as to apply differently according to such factors, as may be specified in the regulations, or according to such limitations or restrictions, whether as to time or circumstance or otherwise, as may be so specified; and
- (b) may provide that it is an offence, punishable on summary conviction, for a person to contravene, or fail to comply with, any of the regulations and may provide in respect of any such offence for the imposition of a fine not exceeding 10 penalty units and, in the case of a continuing offence, a further fine not exceeding 2 penalty units for each day during which the offence continues.