# Filming with a Smartphone/Hidden Camera Information Sheet

Making films on a smartphone or using surveillance and listening devices raises important issues such as consent and privacy. This information sheet discusses what artists or arts organisations need to know when planning to film with a smartphone or hidden camera.

## Introduction

Making short films or videos using mobile phone technology is increasingly common. Generally, the same legal issues need to be considered whether your film is made on a phone, or any more traditional equipment. However there are some important legal matters that are particularly relevant to the making of films on a smartphone or surveillance device. Those issues arise because people can easily be recorded on such devices without their knowledge.

## Surveillance and listening devices

There is legislation in each state and territory concerning surveillance and listening devices (which would including mobile recording devices such as mobile phones), intended to protect peoples' private activities and conversations. In all states and territories, there is a specific prohibition on the use of a listening device (such as a mobile phone or hidden film camera) to record a private conversation without the consent of the participants to that conversation.

Such legislation also generally restricts publishing or 'showing' unauthorised recordings that were obtained by using such a listening device. Though the legislation is slightly different in each state and territory, the best practice for film makers who record or capture peoples' conversations on film and/or to use such footage in their film is to get the explicit consent of anyone whose conversation they record.

### New South Wales

Under s 8 of the *Surveillance Devices Act 2007* (NSW), the use of visual recording devices such as video cameras is only prohibited where trespass on private premises is involved. However, s 7(1) of the Act prohibits installing, using or even maintaining a 'listening device' that hears or records private conversations, whether or not the user is a party to those conversations. Under s 4(3) of the Act, any device that can record or transmit visual images may be classified as a 'listening device' if it can also record or listen to sound. This means that most video cameras (including integrated smartphone video cameras) are likely to be classified as 'listening devices' under the Act.

Section 11(1) of the Act also prohibits the publication of any recorded private conversations or their content. This includes simply telling another person about the conversation without consent from the parties to the conversation, even if the conversation was directly recorded by someone else.

### Victoria

In Victoria, the prohibition on using purely visual recording devices is somewhat broader, as s 7 of the *Surveillance Devices Act 1999* (Vic) prohibits the optical recording of a 'private activity' to which the device user is not a party in addition to audio recording. Under s 3 of the Act, this does **not** include an activity occurring outside of a building or an activity the participants could reasonably expect might be seen by someone else. However, it is worth keeping in mind, particularly when filming in an indoor public space. It should also be noted that the definition of 'building' in s 3 of the Act is very wide, and includes 'any structure'.

The prohibition on communication or publication of private information obtained from a recording extends to both visual and audio recordings under s 11 of the Act.

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## Western Australia

Like Victoria, in Western Australia the optical or audio recording of a private activity or conversation is prohibited under ss 5(1) and 6(1) of the *Surveillance Devices Act 1998* (WA). The definitions of 'private activity' and 'private conversation' found in s 3 of the Act are broad, encompassing any activity or conversation occurring in circumstances that indicate any of the parties to the activity or conversation desires it to be seen or heard only by themselves. However, the definition is somewhat limited as it does not capture activities and conversations which that party could reasonably expect would be seen or overheard by others. It is therefore unlikely that the recording of outdoor activities occurring in public spaces is prohibited under the Act, but it is worth bearing in mind the nature of the surroundings and whether they could give rise to an expectation of privacy.

As in other jurisdictions, the publication of information obtained from recordings of private activities or conversations without the consent of parties to the activity or conversation is prohibited under s 9 of the Act.

## Queensland

Queensland does not have specific legislation that regulates the use of audio or visual recording devices. However, ss 227A–C of the Schedule to the *Criminal Code 1988 (Qld)* contains some limited provisions regarding the use of visual recording devices (including both still and film cameras). Section 227A prohibits the visual recording of a person without their consent in a private place **or** while they are engaged in a private act. Distributing such a recording to others is also prohibited under s 227B. However, the definition of 'private act' contained in s 207A of the Code is limited to showering or bathing, using a toilet, engaging in intimate sexual activity or otherwise being in a state of undress. It is therefore unlikely that filmmakers are at risk of capturing such activities while filming in a public place.

## Northern Territory

In the Northern Territory, knowingly recording a private activity or conversation with an optical or audio device is an offence under ss 11 and 12 of the *Surveillance Devices Act 2007* (NT). The definitions of private activities and conversations are in similar terms to the Western Australian legislation and are just as wide. The communication or publication of any material obtained from an optical or audio recording of a private activity or conversation is an offence under s 15 of the Act.

## Australian Capital Territory

Similarly, only audio recording devices are regulated in the ACT under the *Listening Devices Act 1992* (ACT). Again, most film cameras or other video recording devices which can also record sound fall within the definition of 'listening device' in the Act's Dictionary. The intentional recording of private conversations is prohibited under s 4 of the Act, and communication or publication of material obtained from such a recording is prohibited under ss 5 and 6. Even mere possession of a private conversation recording is an offence under s 7.

The definition of 'private conversation' in the Act's dictionary is context based like those adopted in Western Australia and the Northern Territory. The limitation on the definition is slightly different, as it is based on the express or implied consent of the principal parties to the conversation. However, the practical effect is still similar, as it is likely that parties impliedly consent to their conversation being overheard if they conduct it in an open, public space with other people close by.

## South Australia

The position is similar in South Australia under s 4 of the *Surveillance and Listening Devices Act 1972* (SA). It is an offence to intentionally use a listening device to record or listen to a private conversation without the consent of all parties to the conversation. The definition of 'listening device' is equally wide, encompassing devices that can also make a visual record. Purely optical recording devices are only discussed in the context of the police warrants.

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There is a prohibition on communicating or publishing information obtained from a recording of a private conversation without the consent of all parties in s 5 of the Act. The prohibition expressly applies to all knowing communications of the content of a recorded private conversation, even if the recording was made by another person.

### Tasmania

The situation in Tasmania is slightly different, as only the use of listening devices is regulated under the *Listening Devices Act 1991* (Tas). However, as in New South Wales and South Australia, the definition of 'listening device' found in s 3 of the Act would capture video cameras that also have the capacity to record audio. The recording of private conversations with any such device is prohibited under s 5 of the Act. The definition of 'private conversation' in s 3 is similar to that found in the Western Australian legislation, so is dependent on context rather than location alone. Publishing or communicating information obtained from a recording of a private conversation is also prohibited under s 9 of the Act.

## Confidential Information

'Breach of confidence' or misuse of confidential information – including information of a private nature – may also come into play in the context of filming with a hidden camera or smartphone. If an individual is filmed while they are engaged in a confidential conversation they may be able to take action against the person who filmed them, even if this occurs in a public space. Businessmen discussing the terms of a proposed business deal in a café or park in the belief that their conversation is completely private might be able to claim a breach of confidence.

See the Arts Law information sheet, Protecting your ideas for a discussion of when a duty to keep information confidential may exist.

## Filming crime in a public place

Mobile phones are often the means by which criminal activity is filmed without the knowledge of the criminal participants or victims. In many cases, such footage is later released on the internet. While this may breach the legislation relating to the use of surveillance devices as discussed above, it also raises other even more serious issues concerning the criminal law. Such footage may be used by the police as evidence in the prosecution of the perpetrators of the crime. If the illegal act involved a sexual assault or underage sexual activity, the person responsible for the filming and/or uploading may also be prosecuted under the laws concerning the creation and dissemination of pornography.

In 2007, a law was passed in France that meant that anyone who "knowingly" filmed illegal acts of assault and distributed the images could be considered an accomplice to the violence. [see Arts Law's art+LAW publication in 2007]. Mobile phone cameras were apparently a main mechanism for this filming. The French law contained an exemption for professional journalists. The media advocacy group Reporters Without Borders said it understood the French government's need to combat youth violence (following a wave of rioting, car burnings and violence in Paris and other cities in 2005); however, it feared the impact of the law would create a "dangerous" distinction between "regular citizens" and journalists in terms of punishment for "happy slapping."

While there is no comparable law in Australia at this time, film makers who film overseas need to take care to adhere to the specific laws of the country they are operating in and also to be aware of the climate of sensitivity towards these practices.

At present there is no law in Australia which considers people who film illegal assaults to be held responsible for the criminal act.

## Filming crime scenes

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In New South Wales, and in most other states and territories, the police are given the ability to declare a place a crime scene and exercise specific crime scene powers that include directing a person to leave the crime scene or preventing a person from entering the crime scene.

The NSW Police Media Policy states that police have no specific powers to stop the media from taking photographs of them or of crime scenes as long as the media stays outside of the crime scene itself and obeys all lawful directions of police officers. However, there are limited circumstances in which police can prevent members of the public from filming such events, for example under anti-terrorism legislation and where the filming or photography constitutes an offence such as offensive conduct. As of May 2015 other states or territories do not publish their police media policies or when a police media policy is published it is limited to the relationship with news media.

## Personal privacy

There are no publicity or personality rights in Australia, and there is no general right to privacy that protects a person's image. However a person's image can constitute 'personal information' under the *Privacy Act 1988 (Cth)* with the consequence that there are circumstances in which businesses and agencies subject to that Act may breach the law by publishing a person's image. For further information see the Arts Law information sheet, Unauthorised use of your image**.**

While there is currently no tort of invasion of privacy in Australia, in *ABC v Lenah Game Meats* (2001) the High Court did not exclude the possibility that a tort of unjustified invasion of privacy may be established in the future. The High Court also left open the question as to whether Australian law recognises a tort of harassment or stalking (separate from any criminal offence of stalking or harassment). *ABC v Lenah* has been considered in cases decided by state courts. Different conclusions have been reached. Some courts come to the conclusion that law of Australia has not developed to the point of recognising an action for breach of privacy, while others have held that an invasion of privacy was an actionable wrong which gives rise to a right to recover damages according to the ordinary principles governing damages in tort. Other courts have look to the UK development of a duty of confidence in relation to private information as the basis for legal remedies for an invasion of privacy.

The Arts Law information sheet, Privacy and the private sector, discusses the possible development of the tort action of invasion of privacy in the section, Developments: tort of invasion of privacy.

## Consent

Most of the legal issues addressed above can be resolved by obtaining the permission or consent of the people whose activities or conversations are being filmed (or in the case of children, the permission of a responsible adult). Obviously actors whose performances are filmed implicitly consent by participating willingly in the film process, however because actors have the benefit of performer's rights you should obtain the written consent of the actors that authorises you to use their performance in your film. There is an argument that members of the public who are aware that a film crew is operating in their vicinity may be taken to have given implied consent to being filmed – although the prudent course would still be to obtain their express consent.

However, it would be very difficult to argue any sort of implied consent by people caught on a hidden camera or mobile phone. Many people might think the filmmaker was simply making a call or taking a photo. The best course of action is to obtain a written release from each person appearing in the film. If that is not possible then make a video recording of the person giving their consent.

See the Arts Law information sheet, Film Location Releases. Arts Law has a Model Release that is suitable for use by commercial film makers.

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## Further Information

Arts Law publishes information sheets on 'Children in the Creative Process' for Australia generally and for each state and territory: ACT, NSW, NT, QLD, SA, TAS, VIC, WA.

The law in relation to copyright, moral rights, performers and ICIP (Indigenous cultural intellectual property) applies to films made on smartphones in the same way as it applies to films made on more traditional film equipment. See Arts Law's information sheets on Copyright, Moral rights, Performers' Rights and ICIP.

See also other useful information sheets for film makers

- Film Location Deed of Release (no payment)
- Film Location Deed of Release (with payment)
- Film/Video Partnership Deed
- Filming in public places
- Film competitions

Arts Law publishes '*Visual Artists and the Law*' by Shane Simpson. 3rd Edition by Annabel Clemens (2013) in EPUB format & eBook – PDF format; which provides a commentary on: the basics of copyright (Ch 1); trading copyright (Ch, 2); protecting your copyright (Ch 3); moral rights (Ch 4); contracts (ch 5); collecting societies (Ch 7); resale royalties (Ch 8); art and the internet (Ch 10); Aboriginal and Torres Strait Islander artists (Ch 11); photography (Ch 12).

Australian Copyright Council information sheets:

- Film & Copyright
- YouTube & Copyright

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