

2 June 2023

Civil Surveillance Reforms
Strategic Policy and Legal Services
Department of Justice and Attorney-General
GPO Box 149
BRISBANE QLD 4001

By email: CivilSurveillanceReforms@justice.qld.gov.au

Dear Sir/Madam,

RE: CIVIL SURVEILLANCE REFORMS

We refer to the Government's *Consultation paper—Civil Surveillance Reforms* (Consultation Paper) and provide the following response.

About Full Stop Australia

Full Stop Australia (FSA) is an accredited, nationally focused, not-for-profit organisation which has been working in the field of sexual, domestic, and family violence since 1971. We perform the following functions:

- Provide expert and confidential telephone, online and face-to-face counselling to people of all genders who have experienced sexual, domestic, or family violence, and specialist help for their supporters and those experiencing vicarious trauma;
- Conduct best practice training and professional services to support frontline workers, government, the corporate and not-for-profit sector; and
- Advocate with governments, the media, and the community to prevent and put a full stop to sexual, domestic and family violence.

FSA, as a national service, draws upon the experiences of our trauma-specialist counsellors to support people impacted by sexual, domestic and family violence across jurisdictions, as well as our clients and other survivor advocates who are part of our [National Survivor Advocate Program](#), to advocate for victim focussed laws and consistent approaches to family, domestic and sexual violence nationally.

FSA's interest in this inquiry is focused on ensuring that any civil surveillance reforms consider and protect victim-survivors of domestic, family and sexual violence. Accordingly, we have limited our feedback on the Consultation Paper to issues of this nature.

Question 2: Are there any other types of surveillance devices which should be included in the definition of 'surveillance device'?

The definition of 'surveillance device' should capture mobile apps or software that can be accessed remotely to track a person's use of their computer or phone, including their communication and browsing history. To the extent that this form of surveillance is not already captured in 'data surveillance device', we recommend expanding the definition to capture it.

Perpetrators of domestic and family violence (DFV) use a range of methods to track and monitor victim-survivors, including surveilling victim-survivors by accessing their computers or mobile devices. For example, a perpetrator of DFV may have permission during a relationship to access and use the victim's computer, devices or cameras within devices – and may use this access to install programs to onforward information without the victim's knowledge or consent. It is important that this reality be reflected in the definition of 'surveillance device.'

We also recommend that criminal prohibitions on the 'use, installation and maintenance' of surveillance devices should extend to procuring another person to 'use, install or maintain' a surveillance device. This would enable a perpetrator of DFV, who procures another person to install a surveillance device, to be held personally liable for its installation.

Question 11: Is the proposed definition of 'excluded owner' appropriate?

We recommend expanding the definition of 'excluded owner' to capture a scenario where:

- A person ("Person A") is the legal owner of a computer, vehicle or other thing;
- Another person ("Person B") was formerly in a domestic relationship with Person A;
- Person B has exclusive use or control of the vehicle, computer or other thing, pursuant to a formal or informal agreement between Persons A and B.

In the above circumstances, Person A should be an 'excluded owner.'

This expansion of the term 'excluded owner' would ensure that, where two people were formerly in a domestic relationship but have separated, a person who still legally owns an item (but does not otherwise control or use it) cannot consent to the use, installation or maintenance of a tracking device on that item.

We note that there is often a lag between a couple separating and obtaining an official property settlement – and in fact, that many separated couples never obtain formal property settlements, as there are not enough assets to make it financially viable. We also note that financial abuse is a form of DFV, and perpetrators of DFV often ensure that all joint assets from a domestic relationship are in their sole name, as a means of maintaining control over their victims. The proposed change would address these realities, and mitigate the risk of perpetrators of DFV with assets in their name consenting to the tracking of their former partners.

For completeness, we note that the current definition of 'excluded owner' would not capture the scenario we are seeking to address, because it seems to require a written agreement (the types of agreements listed are all quite formal and would usually be in writing). We note that in circumstances of DFV, it is often not possible, safe or practical for a victim-survivor to obtain a written agreement from a perpetrator allowing the victim-survivor to use an asset in the perpetrator's legal name.

Question 12: Is it practical to require the consent of each person where there is more than one person who is an owner or a person in lawful control?

It is necessary, where there is more than one person who owns or is in lawful control of an item, to require the consent of each such person to place a tracking device on the item.

This position reflects the reality that, in domestically abusive relationships, it is common for a perpetrator of DFV to have sole legal ownership of all shared assets (which, as set out above, is a form of financial abuse). Without the requirement for the consent of all parties, a tracking device could lawfully be placed on a shared item, without the knowledge or consent of a person who uses the item regularly but is not its legal owner. For example:

Bob and Susan are in a domestic relationship and share the use of a car. However, the car is in Bob's sole name. Without the requirement for the consent of all parties, Bob could lawfully consent to the placement of a tracking device on the car without Susan's knowledge or consent. Bob could then use the tracking device to track Susan's whereabouts without her knowledge.

Question 13: Is it clear who would be in lawful control of a vehicle or thing?

We note that the draft *Surveillance Devices Bill 2020* does not define 'lawful control.' We consider that any legislative amendments giving effect to the changes considered in the Consultation Paper should define this term. We think this is necessary for clarity.

Among other things, the definition of 'lawful control' should encompass the situations referred to in our responses to questions 11 and 12 above – i.e.:

- Where a person does not legally own an asset, but has exclusive use of it following the breakdown of a domestic relationship; and
- Where a person's domestic partner is the sole legal owner of an asset, but the person nonetheless has ongoing joint use of it.

Question 14: Is it practical to require the consent of each person where there is more than one person who is an owner or a person in lawful control?

For the reasons above in response to question 12, we consider it is necessary to obtain the consent of all persons who own or are in lawful control of the computer.

Question 15: Is it sufficiently clear who would be in lawful control of a computer?

We repeat our submissions on Questions 11-13 above. We consider that the changes proposed in response to those questions should also apply to definitions of 'excluded owner' and 'lawful control' in the context of the use, installation or maintenance of a data surveillance device on a computer.

In addition, we recommend clarifying that the definition of ‘excluded owner’ would capture the following scenario:

- Persons A and B were in a domestic relationship, and as part of that relationship, shared the use and control of a computer;
- During the relationship, Person A installed a data surveillance device on the computer; and
- When the relationship ended, Person B got exclusive use and control of the computer, pursuant to a formal or informal agreement between Persons A and B.

In the above circumstances, Person A should be an ‘excluded owner.’

FSA recommends this change to address a possible loophole for perpetrators of DFV, who could install a data surveillance device on their partner’s computer prior to their relationship ending, then subsequently argue that they had ‘lawful control’ of the computer when the device was installed.

Question 17: Would the term ‘lawful interests’ be sufficiently understood by persons seeking to comply with or enforce the QLRC draft Bill so as to be readily applied as an exception?

We are concerned that the Consultation Paper states that the following scenario might constitute unlawful conduct in some circumstances:

A victim of crime recording a conversation with an alleged offender for the purpose of obtaining admissions; however, this will depend on the particular circumstances, including the proximity in time of the offending to the conversation and the victim’s ability to take other reasonable action, such as approaching the police.

We have been advised by the Queensland Sexual Assault Network that Queensland Police sometimes advise victims to go home and record the offender admitting to the crime before charges will be laid.

We also note that it can be extremely difficult for victims of sexual violence to be taken seriously by police, and charges may not be laid in sexual violence matters where there is insufficient evidence. In addition, for populations who have worse outcomes interacting with police, who may not feel comfortable approaching police, or who may be mistrustful of police – for example, some Aboriginal and Torres Strait women and women from culturally and linguistically diverse backgrounds – it would be reasonable to seek extra evidence before approaching police.

FSA would be very concerned about victims of sexual violence and/or DFV being subjected to penalties under the proposed legislation. We recommend that any legislation introduced should contain a specific provision clarifying that a victim of crime recording a conversation with an alleged offender for the purpose of obtaining admissions is protecting their own ‘lawful interests.’

Question 23: Is it appropriate to have an exception for the purpose of location and/or retrieval of a vehicle or thing?

We believe that any exception for location and/or retrieval of a lost or stolen vehicle or thing needs to be carefully drafted, with a view to not creating loopholes for perpetrators of DFV.

We refer to the following scenario:

Janet and Michael are a domestic partnership, in which Michael is domestically abusive towards Janet. In the relationship, Michael shares the use of Janet's car, and uses this access to install a tracking device on it, so that he can monitor Janet's whereabouts. Following an instance of physical intimidation by Michael, Janet decides to leave while he is at work. She heads to a women's refuge, taking only her car and very few personal belongings.

In this scenario, the perpetrator of DFV arguably meets the requirements of the proposed drafting in the QLRC draft Bill – i.e. he is not in possession of the vehicle, could argue that he has reasonable grounds to believe the vehicle was stolen, and was in lawful control of the vehicle before it went missing.

In relation to the scenario presented, we note that it is common for victim-survivors of DFV to leave a domestically abusive relationship without telling the perpetrator, due to fears for their personal safety. We also note that it is not uncommon for DFV perpetrators to make reports of stolen vehicles to police, when they know their ex-partner has the vehicle, and advocate for her to be charged with theft – which adds further complexity to the proposed exception in the QLRC draft Bill.

To address these issues, we recommend that any legislative amendments clarify that a 'reasonable belief' that an item was lost or stolen will not exist where there are attending circumstances of DFV. While noting that 'reasonable belief' is an objective standard, and a Court may find that a belief that an item was stolen was not reasonable in circumstances of DFV, insofar as the current drafting is open to challenge by perpetrators, a specific carve-out for DFV is needed.

Question 34: Do you think that the exceptions in the QLRC draft Bill adequately ensure that surveillance activities conducted for law enforcement and related purposes can continue to be undertaken? Otherwise, should there be a specific exception for law enforcement related purposes and if so, in what circumstances should it apply?

The Consultation Paper notes that:

Under the IoP Act, it is currently lawful for a person who is a party to a private conversation to use a listening device to record the conversation, without the other party's consent. A person who was the victim of or a witness to a criminal offence might, for example, record a conversation that they have with the alleged offender, without that person's consent, in order to gather evidence or obtain corroboration of their version of events.

We consider that this position should be maintained under any new legislative regime (in addition to the other proposed exceptions dealt with in the Consultation Paper).

As noted above, it is not uncommon for police to ask a victim-survivor of sexual violence to try to get their perpetrator to admit their crimes, especially in historical abuse cases, either independently or through police surveillance and recording. The law should specifically state that this is an exception to what would otherwise be unlawful surveillance.

We encourage the Government to consult with experts on the dynamics of technological abuse

We recommend that the Government consult with DFV sector colleagues – especially those knowledgeable about the dynamics of technology-facilitated abuse – on the proposed reforms.

If this has not already occurred, we especially recommend consulting with WESNET, the national peak body for specialist women's domestic and family violence services. Among other things, WESNET provides information and resources on how survivors of technology-facilitated abuse can increase their technology privacy and security. WESNET and other DFV sector colleagues would be able to provide up-to-date examples of the use of technology against victim-survivors, to ensure these issues are appropriately addressed in any legislation.

If you have any questions in relation to the issues raised in this letter, please do not hesitate to contact either myself or Full Stop Australia's Head of Advocacy, Emily Dale, at emilyd@fullstop.org.au.

Yours faithfully,



Tara Hunter

Acting CEO

Full Stop Australia