



Can I secretly record my former partner for family law proceedings?

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As technology integrates itself into all aspects of life, it has become much easier to secretly record conversations and disputes. Family law proceedings are often messy, tiresome, and emotionally driven. In these circumstances, secretly recording your former partner to gather evidence for court proceedings may be tempting. However, it is important to note the legal limitations that may prevent this type of evidence from being admissible in Court and the risks associated with doing so.

This blog concentrates on the issues associated with secretly recording your former partner during family law proceedings but it is also critical to understand that, in most states and territories of Australia and federally, there are also criminal offences related to recording a person without their knowledge or consent.

What is a secret recording?

An audio or visual recording will be considered secret if your former partner did not explicitly consent to being recorded and where there is no implied consent. There may be implied consent if, for example, the recording is from a security camera at your property. For there to be implied consent, there must be sufficient reason to believe that your former partner was aware that they were being recorded.

Admission of secret recordings in family law court proceedings

The admission of secret recordings into evidence is decided on a case-by-case basis. The Senior Judicial Registrar or the Judge with conduct of your matter will have discretion.

In determining whether to admit any secret recording, the Court will consider a wide range of factors, including but not limited to:

- Whether the recording breaches any privacy laws. In Victoria, [section 7\(1\) of the Surveillance Devices Act \(Vic\) 1999](#) prohibits secret recordings without the explicit or implied consent of those involved in the conversation. However, section 7(2)(c)(ii) provides an exemption where the recording is *'reasonably necessary for the protection of any person's lawful interests'*;
- *'Whether 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'* ([Section 138 of the Evidence Act \(Cth\) 1995](#)); and
- The circumstances surrounding the recording, including who made the recording, why the recording was made, who was present during the recording and whether the recording could be considered misleading.

When has the Court allowed secret recordings in family law cases?

Court allows secret recordings in case involving coercion and abuse

In the case of [Corby & Corby \[2015\]](#), the Court admitted secret recordings made by the mother into evidence, as the Judge decided it protected her *"lawful interests"*. The father in this case denied the mother's allegations of repeated sexual coercion and physical and emotional abuse. The mother's recordings were probative and the desirability of the recordings to corroborate her version of events outweighed the undesirability of admitting the secret recordings.

Court allows secret recording in case involving family violence

In the case of [Coulter v Coulter \(No 2\) \[2019\]](#), the Court admitted secret recordings taken by the mother at changeover into evidence.

The mother was a victim of [family violence](#). At the time of making the recordings she had a legitimate concern for her safety and was trying to obtain proof in order to obtain an [Intervention Order](#) against the father. The Judge decided the secret recordings protected the mother's *'lawful interests'*. However, the Judge did not allow a private recording of conversations between the father and the children to be used as evidence, holding that this was a breach of privacy laws.

When has the court not allowed secret recordings to be admitted into evidence?

Judge denies use of secret recordings due to irrelevance to issues in dispute

In the case of [Nagel & Clay \[2020\]](#), the mother attempted to admit approximately eight hours of secret recordings of the father into evidence. These recordings had been taken at changeover and prior to separation without the father's consent.

The Judge excluded the recordings. The Judge found a large portion of the recordings to be irrelevant to the issues in dispute. Of the recordings that were relevant, the probative value of these recordings was outweighed by the undesirability of admitting evidence that would unfairly prejudice the father and mislead the Court.

Case law suggests that a Court is more likely to admit a secret recording into evidence in cases involving family violence and is likely to reject a recording obtained through children (for example, where a party secretly plants a recording device on a child) or where children are involved in the recorded conversation.

Risks of secretly recording your former partner in family law proceedings

Although secret recordings have been admitted into evidence and provided probative value in some family law cases, attempting to admit recordings into evidence carries risk. In Victoria, secretly recording a person is a criminal offence, punishable by a fine, imprisonment or both. If you attempt to admit a secret recording into evidence and the Judge excludes the evidence, the secret recording may be reported to Victoria Police.

Furthermore, a secret recording may diminish your credibility and negatively impact your case.

In the case of [Guzniczak & Rogala \[2017\]](#), the husband had secretly recorded conversations with his wife prior to separation, with the intent of using them in Family Court proceedings.

Although the recordings were admitted into evidence, the Judge found the way the recordings were obtained to be demonstrative of the husband's *"theatrical and manipulative behavior"*. For example, on one occasion, the telephone had been set up in a concealed manner, with the husband placing himself in the centre of the screen. It was also found that the husband *"played the victim"*, asked leading questions of the wife and *"goaded"* her to behave in a particular way.

The Judge ruled negatively against the husband as a result of the secret recordings.

How can a family lawyer help?

If you have a secret recording or are considering recording your former partner and would like further information on this topic, get in touch to book a free appointment with one of our experienced family lawyers.

This blog is of a general nature and should not be relied upon as legal advice. If you require further information, advice or assistance for your specific circumstances, please contact us.