

***Groom v Police* [2015] SASC 101 (14 July 2015) – South Australia Supreme Court**

*Note: this case was decided under now superseded legislation however the case contains relevant statements of principle.

‘Construction of terms’ – ‘Contravention of intervention order’ – ‘Electronic listening device’ – ‘Evidence’ – ‘Interpretation of intervention order’ – ‘Protected person’ – ‘Public interest’

Charge/s: Contravention of intervention order.

Appeal Type: Appeal against conviction.

Facts: An intervention order was in place between the appellant and his former partner. The breach arose from a conversation between the appellant and his former partner. The order prohibited discussions between the pair other than with respect to their child. In conversation, the appellant then brought up the appellant’s ongoing court proceedings relating to the intervention order itself. At trial, the Magistrate admitted into evidence an audio recording of this conversation secretly made by his former partner. His former partner claimed she was advised by police to record communications between her and the appellant. Conversations between her and the appellant were usually unwitnessed by anyone else, which made previous complaints that she had made to police a case of her word against his and thus difficult to prove in court.

Issue/s:

1. Whether the conversation was permitted by the intervention order.
2. Whether the recording should have been excluded because it was unlawful pursuant to the *Listening and Surveillance Devices Act 1972* (the Act). More specifically, whether the use of the device was in the public interest or for the protection of the former partner’s lawful interests under section 7 of the Act.

Decision and Reasoning: The appeal was dismissed.

1. The Court rejected an argument that the conversation was permitted by the intervention order. The topic of the conversation, (the intervention order itself) was not related to their child which was the only topic that the intervention order allowed them to discuss. See further at [47]-[58].

2. Nicholson J held: the conversation was a private conversation within the meaning of the Act; the former partner intended to use the device to record the conversation and that there was no consent to the conversation being recorded. The Court then considered whether the use of the device was in the public interest or for the protection of the former partner's lawful interests. While his Honour acknowledged that the breach was relatively minor, he noted that breaches of intervention orders are serious. In this case, the former partner had made many allegations of breaches but had encountered problems with proof. The Court accepted that the former partner held genuine concerns for her own safety. Nicholson J then made the following comments at [39]-[40] about how recording private conversations can be in a protected person's 'lawful interests' – '*... there is no way of knowing how seriously an intervention order might be breached until the fact of breach takes place. Breaches of intervention orders are capable of constituting serious crimes. Irrespective of whether or not a serious crime is in contemplation, a court should more readily accept that the recording of a "private conversation" has been carried out in pursuit of a person's lawful interest in circumstances where that person has a genuine concern for their own safety. Domestic violence is a very serious problem in our community. It would appear that, at least, the recognition and reporting of domestic abuse, be it physical, psychological, or by threatening behaviour, is on the rise. An intervention order is a very important first step in protecting a person, usually a woman, who has been the subject of domestic abuse. Such an order gains much of its value in this respect according to the extent that it can be enforced. Respondents must be discouraged from infringing any such court order.*'

The Court also accepted that the recording was in the public interest for two reasons. Firstly, that there is a public interest in, 'allowing a protected person... the ongoing protection available through the recording and documenting of interactions that result in breaches' (See at [44]). Secondly, that these recordings can assist the defence as well as the prosecution (see at [45]). It would also be possible for a defendant to make similar recordings to disprove a false allegation.