



Submission by Free TV Australia

Senate Legal and Constitutional Affairs
Committee

*Inquiry into the comprehensive revision of
the Telecommunications (Interception and
Access) Act 1979*

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EXECUTIVE SUMMARY

- A review of the *Telecommunications (Interception and Access) Act 1979 (the Act)* is timely. At present the Act does not contain sufficient protections or safeguards in relation to the access and use of telecommunications data by government agencies.
- In particular, there needs to be special consideration given to the access to and use of journalists' telecommunications data, and the specific issues that arise in relation to the protection of sources and whistle-blowers.
- Free TV generally supports the recommendations of previous reviews which are under consideration by the Committee. Taken together, these recommendations should result in revisions to the Act which will improve privacy protections, limit the number of agencies who can access telecommunications data, introduce assessments of proportionality and gravity in relation to the access of data, and improve transparency and accountability.
- Free TV supports the introduction of a Public Interest Monitor (PIM) to represent the interests of those persons who are the subject of an *ex parte* warrant application, as contemplated by recommendation 71-2(e) of the Australian Law Reform Commission in its report *For Your Information: Australian Privacy Law and Practice* (No 108).
- In line with previous recommendations, any proposed legislative change should be the subject of a public consultation process via an exposure draft, as well as a further Parliamentary Committee process.

Introduction

Free TV Australia (Free TV) is the peak industry body representing all of Australia's commercial free-to-air television broadcasting licensees. Free TV welcomes the opportunity to contribute to the Committee's Inquiry into the Comprehensive revision of the *Telecommunications (Interception and Access) Act 1979* (the Act).

It is a well-established principle that the protection of journalists' sources is a key component of a free and open media in a democratic society. A number of states have introduced shield laws (with varying levels of coverage), which allow journalists to protect their confidential sources in a range of circumstances. Similarly, there are laws providing some protection to whistle-blowers who disclose to the media.

The Act currently provides for access to significant data by a broad range of agencies. In the case of access to metadata, no warrant is required. Such widespread access has the potential to seriously compromise the activities of journalists and their ability to communicate with sources on a confidential basis.

This is an unsatisfactory situation, and Free TV urges the Committee to take these matters into account in their consideration of the Act and recommend changes to reduce the current levels of access, introduce a proportionality and gravity test, and improve accountability and transparency.

1. Protection of sources

A journalist's capacity to protect the identity of an informant is fundamental to free press and the free flow of information within society. This principle has been recognised in a range of fora, including the Commonwealth Parliament¹, the Journalists' Code of Ethics (at clause 3)², and the European Court of Human Rights³.

Ordinarily, journalists are bound by the principles of transparency and are required to disclose the sources of their information. This allows the public to evaluate the credibility and integrity of the information provided.

In some cases however, journalists must agree to keep their source confidential. Informants may request this to protect themselves against a number of detrimental consequences including threats to their safety, employment and reputation.

A recent report by Human Rights Watch about developments in the United States highlights the impact that surveillance and monitoring of journalists has on both their ability to protect sources, and to report matters of public importance:

The government's large scale collection of metadata and communications makes it significantly more difficult for [journalists] to protect themselves and their sources, to confirm details for their stories, and ultimately to inform the public.

¹ Through introduction of laws such as the *Evidence Amendment (Journalists' Privilege) Act 2010*, introducing Division 1A of Part 3.10 into the *Evidence Act 1995* (Cth).

² <http://www.alliance.org.au/code-of-ethics.html>

³ See *Goodwin v United Kingdom* judgement 27 March 1995 at 39; also: http://www.echr.coe.int/Documents/FS_Journalistic_sources_ENG.pdf

...many journalists said that the government's increased capacity to engage in surveillance – and the knowledge that it is doing so on an unprecedented scale – has made their concerns about how to protect sources more acute and real.

Journalists repeatedly told us that surveillance had made sources much more fearful of talking.

There are good reasons to believe that recent developments are reducing the amount and quality of news coverage of matters of public concern.⁴

Access to journalists' telecommunications data (including access to metadata without a warrant) jeopardises the ability of journalists to protect their sources and may lead to a lapse in confidentiality. This in turn has the potential to expose the journalist's source to significant and serious ramifications.

Free TV is also very concerned at the prospect of third parties such as telecommunications providers being required to decrypt telecommunications data. Encryption and other security technologies are increasingly used by journalists to protect sensitive material and any decryption of such material should not be undertaken without a warrant, along with appropriate scrutiny and accountability.

Any review of the Act should address these existing deficiencies, and provide for a more robust regime that reflects the need for journalists to protect sources in certain circumstances.

2. Deficiencies in the Act

At present under the Act, a warrant is required for access to the content of real time communications, and the content of stored communications.

A warrant is not required for an enforcement agency to gain access to metadata. Metadata includes details of telephone numbers called or texted, the dates on which this occurred, how long the conversations lasted, and the sequence in which telephone numbers were called or texted. Metadata can be very revealing and can expose a journalist's network of sources and the way in which a story has been developed.

The threshold for accessing metadata without a warrant is low – the disclosure must be reasonably necessary for the enforcement of criminal law, or a law imposing a pecuniary penalty or for the protection of public revenue.⁵ The agencies that are able to access this metadata are numerous and broad-ranging.

This situation is undesirable and places at risk the ability of journalists to maintain source confidentiality.

The Act also does not provide a separate or additional consideration that attaches to the acquisition of telecommunications content or metadata belonging to journalists, who play a particular role in delivering news and information to the community.

⁴ Human Rights Watch in conjunction with the American Civil Liberties Union (2014) *With Liberty to Monitor All* see: Chapter II; www.hrw.com

⁵ Section 177 of the Act

The special role of journalists and the need for them to protect their sources has been recognised by the inclusion of “shield laws” in the *Evidence Act 1995* (Cth), and the Evidence Acts of most States and Territories. This unique position should also be reflected as part of this framework.

3. Changes required

The Committee is tasked with considering:

- the recommendations of the Australian Law Reform Commission *For Your Information: Australian Privacy Law and Practice* report, dated May 2008, particularly recommendation 71.2 (the ALRC report); and
- recommendations relating to the Act from the Parliamentary Joint Committee on Intelligence and Security *Inquiry into the potential reforms of Australia’s National Security Legislation* report (the PJCIS report), dated May 2013 – in particular Recommendations 1 to 18.

These recommendations are broad ranging and, if implemented, would amount to a comprehensive revision of the Act. The recommendation from the ALRC report and Recommendations 1-10 and 18 of the PJCIS report are generally directed to the following changes in the current regime:

- Increased importance placed on the privacy of communications, including the incorporation of privacy protection as an objective to the Act;
- Improving proportionality by incorporating a test that examines privacy impacts, and balances the gravity of the relevant conduct against the public interest in the disclosure of the data;
- Improving oversight, transparency and accountability of the data access regime;
- Increasing and standardising the threshold for access to data to recognise gravity of conduct, with a view to reducing the number of agencies accessing data;
- Standardising the warrant process, targeting interceptions based on certain attributes, and reviewing information sharing provisions; and
- Considering the introduction of a Public Interest Monitor (PIM) to act as contradictor in *ex parte* warrant applications.

Free TV supports each of these outcomes. They are directed towards improving the existing regime, and making the access of communications data more proportionate, targeted and accountable. A priority for reform must be to increase the threshold for access, and reduce the number of agencies who can seek access.

Free TV also supports the provision of a PIM as part of a revised Act. This will provide for an additional level of scrutiny and oversight for agencies that are accessing telecommunications data. Having an independent party act as contradictor will provide an additional safeguard in relation to the access of data, and enhance accountability.

Further to these changes, Free TV recommends that additional thresholds or considerations be placed on requests for access to journalists’ telecommunications data. These additional factors should recognise the need for journalists to preserve the confidentiality of certain sources, and the special role of journalists in delivering timely, independent news and information to the community.

The process for accessing a journalist's data should be more rigorous, and include:

- additional considerations for access to data that would normally be obtained under warrant, such as the specific public interest in maintaining confidentiality of journalists' sources;
- requiring a warrant for access to journalists' metadata; and
- requiring the participation of the PIM for any application for access to a journalist's telecommunications data.

Section 126G of the *Evidence Act 1995* (Cth) provides a definition of journalist which could be adopted for such a purpose.

Free TV would be very concerned if any of the Committee's recommendations led to an increase in surveillance powers, or an expansion of the existing regime.

4. Further consultation

Free TV notes that the recommendations being considered by the Committee include the issue of a public exposure draft of any revised Act, as well as a further Committee review process.

Both of these processes are supported by Free TV, particularly given the substantial changes that are recommended and the significance of the issues involved.