



**Submission by
Free TV Australia**

Australian Human Rights Commission

Rights and Responsibilities 2014

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EXECUTIVE SUMMARY

- Free TV welcomes the Australian Human Rights Commission's consultation on how effectively we protect people's human rights and freedoms in Australia.
- The right to freedom of expression is fundamental to an open and democratic society. Ensuring its protection is particularly important in Australia where the right is not enshrined in the Constitution or any overarching human rights legislation, as it is in the US or the UK.
- Free TV is of the view that there are a number of key areas where laws unreasonably encroach on the right to freedom of expression, which we outline in this submission, including:
 - National security laws;
 - Defamation laws;
 - Freedom of Information laws;
 - Surveillance devices laws; and
 - Privacy and related laws.
- Free TV looks forward to engaging with the Australian Human Rights Commission and the Australian Law Reform Commission further in relation to how competing rights and responsibilities can be better balanced.

Introduction

Free TV Australia (Free TV) welcomes the opportunity to respond to the Australian Human Rights Commission's Discussion Paper, *'Rights and Responsibilities 2014'* ("Discussion Paper").

Free TV represents all of Australia's commercial free-to-air television broadcasters. At no cost to the public, our members provide fifteen channels of content across a broad range of genres, as well as rich online and mobile offerings. The value of commercial free-to-air television to the Australian public remains high. On any given day, free-to-air television is watched by more than 14 million Australians.

Free TV members play a critical role in enabling members of the public to exercise their right to freedom of expression. The right to freedom of expression includes the freedom to both express and receive information and ideas, over a range of different media. The information rights of the media and individuals are inherently related, and ensuring that the media is not unreasonably constrained in reporting is critical to maintaining a robust democracy.

Free TV strongly supports the review of current legislation, policies and practices in order to achieve a more robust right to freedom of expression for the media and the public.

The importance of the right to freedom of expression

The right to freedom of expression (or the freedom of speech), is fundamental to an open and democratic society, and to responsible and accountable government. The free flow of information and exchange of ideas makes for better democratic decision-making by government, improves transparency and accountability and provides citizens with the ability to make informed political choices. The right is enshrined in Article 19(2) of the *International Covenant on Civil and Political Rights*, to which Australia is a signatory. Article 19(2) provides that:

"Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive, and impart information and ideas, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

In Australia, unlike the US in the First Amendment to its Constitution, and the UK in its *Human Rights Act 1988* (UK), the right to freedom of expression is not enshrined in legislation, while laws which by their nature encroach on the freedom of expression are extensive and often overlapping. For example, privacy laws applicable to broadcasters include numerous pieces of State legislation, Commonwealth legislation, the common law, the Commercial Television Industry Code of Practice, and the ACMA Privacy Guidelines for broadcasters. These obligations are also replicated by way of broadcasting licence conditions.¹

In this context, while it is important to ensure that the freedom of expression is appropriately limited where it is necessary to balance other rights or freedoms, there are a number of examples of legislation, policies and practices where the right to freedom of expression has been unnecessarily curtailed.

¹ For a summary of these obligations, see the Commercial Television Industry Code of Practice, January 2012, Advisory Note, Privacy.

A consideration of laws that unduly restrict the freedom of expression is therefore timely and the key areas that Free TV considers exemplify this are considered below.

National security laws

Free TV recognises the importance of protecting Australia's national security, and the safety of the personnel involved in intelligence and national security operations. However, Free TV is concerned that the range of measures contained in recent national security laws will significantly restrict the media in effectively reporting on public interest matters, in a manner that is disproportionate to the harm to be prevented and without adequate safeguards.

1. National Security Amendment Bill (No. 1) 2014

Free TV is concerned that the recent passage of the *National Security Amendment Bill (No. 1) 2014* ("the National Security Bill") by both houses of the Parliament, creates offences relating to the unauthorised disclosure of information, punishable by a term of imprisonment of up to 10 years.² While we understand that the Government has indicated that the legislation is not intended to capture the activities of journalists reporting in the public interest,³ their drafting does not exclude those activities.

Furthermore, section 35P of the National Security Bill appears to have an unduly broad application in several respects. For example:

- It applies to any information that 'relates to' a Security Intelligence Operation (SIO);
- It appears to capture:
 - Circumstances where a person does not know whether the relevant information relates to an intelligence operation;
 - Circumstances where a person knows that the information relates to an intelligence operation but does not know whether or not that intelligence operation is an SIO;
- It is unclear whether SIO status can be conferred retrospectively;
- It appears to apply regardless of who the disclosure is made to, for example, if a journalist discloses the material to his/her editor and the story is subsequently not published, the offence provision may still apply
- If a number of disclosures are made in the course of preparing a story, it appears to apply to all disclosures (for example, it could apply to the source, the journalist and the editor, even if the story is not ultimately published);
- It applies to whistle-blowers, further discouraging whistleblowing.

The impact of this provision is amplified in the context that information relating to SIOs is unlikely to be readily identifiable as such. As a result, journalists reporting on intelligence and national security matters will not necessarily know whether or not information "relates to" an SIO or not.

2. Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014

² *National Security Amendment Bill (No. 1) 2014*, sections 35P(1) and (2).

³ See for example, interview of the Hon. George Brandis on *Q and A*, ABC, 3 November 2014.

Similarly, Free TV is concerned that the recent passage of the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (“the Foreign Fighters Bill”), by both houses of the Parliament, creates a range of offences which risk criminalising the conduct of journalists in carrying out their jobs.

Free TV has serious concerns in relation to section 119.7 of the Bill, which prohibits the advertising or publishing of material procured by the promise of provision of money or ‘any other consideration’, and which discloses the manner in which someone might be recruited to become a foreign fighter. This provision risks exposing journalists to jail terms of up to 10 years for reporting on matters which relate to the recruitment methods employed by terrorists.

Free TV is also concerned that section 3ZZHA of the Bill, which prohibits the unauthorised disclosure of information in relation to the application for or execution of a delayed notification search warrant, further risks exposing journalists to jail terms for up to 2 years.

The provisions of both the National Security Bill and the Foreign Fighters Bill create a significant and unreasonable level of risk in relation to reporting on national security matters, which will lead to the stifling of reportage on those matters.

3. Telecommunications (interception and access) Amendment (mandatory data retention) Bill 2014

Free TV is also concerned that the broad reaching provisions of this Bill, which has been referred to the Joint Parliamentary Committee on Intelligence and Security, will constrain the work of journalists in reporting on public interest matters.

This Bill creates a power to make regulations requiring telecommunications companies and other online service providers, to retain, for not less than two years, a range of customer information or metadata, including information relating to:

- The identity of the subscriber to a service;
- The source and destination of a communication;
- The date time and duration of a communication;
- The type of communication; and
- The location of the equipment used.⁴

Free TV understands that this information will effectively make the web browsing histories of individuals readily accessible. While currently under the *Telecommunications (Interception and Access) Act 1979*, law enforcement agencies can only intercept messages or require the storing of messages or access to stored messages if they first obtain a warrant, the proposed Bill only requires the issue of a notice by a law enforcement officer in order to exercise these powers.

Legal commentators have noted that the information that can be collected under the provisions of this bill may be more threatening to personal privacy and could provide a more detailed chronicle of life than the actual content of any message.⁵

Free TV members are concerned that the creation of this archive of information has implications for journalists whose sources may be traced and whistle blowers, who

⁴ Telecommunications (interception and access) Amendment (mandatory data retention) Bill 2014, s 187A (2).

⁵ Fair, P., *Data retention: The potential impact of metadata*, Gazette of Law and Journalism, 11 November 2014.

may become identifiable. Furthermore, the fact that the legislation does not contain any provision which prevents the stored information from being used in the ordinary course of civil litigation also amplifies the risks.⁶

Defamation laws

Free TV is of the view that defamation laws are in need of reform. While the objective of defamation laws is to balance protection of individual reputation with freedom of expression, in practice, these laws are used as a means of stifling free speech. A threat of defamation proceedings, whether or not a plaintiff's claim is likely to be upheld by a court, can be sufficient for media outlets to remove the material in question in order to remove any risk of being embroiled in lengthy legal proceedings.

The unified defamation laws introduced in 2006 remain largely unamended since that time. Those laws deal with defamation in relation to publications generally, rather than specifically to particular media such as the internet. This has led to a situation where a number of aspects of the law are outdated and ill-equipped to deal with online publications, and as a result impact on freedom of expression. For example:

Single publication rule

Free TV is of the view that a 'single publication rule' should be enacted in Australia to limit the circumstances in which a person may bring an action in relation to the publication of material when the same material has previously been published.

This is particularly important for publications on the internet. Under the current law defamatory material on the internet is considered to be 'published' every time the material is accessed online. Consequently, the statutory limitation period that applies in the print environment does not apply and there is effectively no statute of limitations for bringing an action for defamation in relation to defamatory materials on the internet.

This also results in a situation where the risk of publishers being exposed to defamation actions increases over time as more material is archived on the internet.

Free TV would support the introduction of a limitation period of one year from the date of first publication of the relevant article on the internet. This would be consistent with the overseas approach (for example the UK legislature recently adopted a single publication rule in s 8 of the Defamation Act 2013 (UK)). Free TV agrees with the ALRC that the UK provision may provide a useful model for defamation law in Australia as well.

Protection for website operators for the publication of the views of others

Currently, website publishers who invite people to comment on material on their websites are open to significant risk of legal action as a result of publishing material posted on their websites by third parties, which may contain defamatory statements. Website operators must choose between either moderating all comments posted on their website or alternatively not allowing any comments to be posted at all. This necessarily hinders free and robust debate.

Free TV would support amendments to the law to protect website operators in this scenario, which is akin to innocent dissemination. This would be consistent with the

⁶ Fair, P., *Data retention: The potential impact of metadata*, Gazette of Law and Journalism, 11 November 2014.

position in the US, where website operators are not held liable for the contributions of commentators,⁷ and the UK, where website operators have a complete defence to any defamation action if they can show that they took immediate steps to remove the defamatory material upon receiving a complaint.⁸

Defences

While defences for defamation actions are available and include fair comment, qualified privilege and contextual truth, their availability varies amongst Australian jurisdictions and Free TV members are concerned that these defences have been significantly eroded via case law to the point where they fail to appropriately balance the protection of individual reputation with freedom of expression. Contextual truth for example, has proven to be a complicated and convoluted defence that has not effectively protected publishers.⁹

Free TV notes that the recent amendments to the UK Defamation Act include a defence for statements which concern a matter of public interest if the defendant reasonably believed the statement to be true. A similar provision to facilitate publication of matters of public importance should be adopted in Australia.

Repeal of criminal defamation

While rarely used, the offence of criminal defamation remains available in Australia with a penalty of up to 3 years imprisonment. This is no longer the case in most democratic jurisdictions and these offence provisions should be repealed.

Freedom of Information (FOI)

Timely access to government information allows the public to be informed about government policies, programs, administration and management, and ensures that the government of the day operates in a transparent and accountable way. Effective FOI laws and practices are fundamental in a democracy.

There are a number of issues with the operation of the current FOI regime that stifle the media's ability to report on government information in a timely way. In particular, Free TV notes the following issues that were raised by the Australia's Right To Know (ARTK) group in its recent submission to the Legal and Constitutional Affairs Legislation Committee regarding the Freedom of Information Amendment (New Arrangements) Bill 2014:¹⁰

- There are almost routine delays past the 30 day time frame for decision making on requests from media organisations;
- Agencies often advise journalists that an FOI request has been refused because of Section 24AA, which provides that the work would involve a substantial and unreasonable diversion of agency resources;

⁷ *Communications Decency Act*, 1996 47 U.S.C., s 230.

⁸ *Defamation Act 2013* (UK), s 5.

⁹ *Besser v Kermode*, [2011] NSWCA 174 (30 June 2011).

¹⁰ The ARTK submission is available on the Parliament of Australia's website. See: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/FIO_Amendment_Bill

- There is no direct right of appeal to the AAT except in the case of decisions made by the Minister or the head of an agency.

The combination of these issues leads to a situation where appeals processes are unreasonably delayed and the media are often unable to proceed with reporting in relation to certain issues, particularly politically-sensitive issues where the timing of the story is critical.

Free TV supports the Hawke Review proposal for a comprehensive review of the FOI Act and its operations.¹¹

Surveillance devices legislation

The ALRC in its recent report recommended that the Commonwealth Government should enact surveillance legislation to replace existing state and territory surveillance device laws. It recommended that any new uniform Commonwealth surveillance legislation should be technologically neutral, so that it applies to all surveillance devices equally, and should contain a 'responsible journalism' defence to protect the media's use of surveillance devices for journalism in the public interest. Free TV strongly supports the ALRC's recommendation.

Currently, there is significant inconsistency in surveillance laws between jurisdictions. In addition, the laws that relate to use of surveillance devices are scattered throughout different legislation, including criminal, within each jurisdiction and it is a very complex process for any person to ascertain what the law is and how it applies. For example, the legislation in some jurisdictions breaks devices into optical, audio and/or data tracking and treats each differently, some jurisdictions regulate some but not all devices and some jurisdictions break down recording and publishing into separate offences. There are generally no exemptions for journalism per se and although some jurisdictions have limited public interest exceptions, they vary widely in scope and application. All of these practicalities add additional layers of regulation for the media.

Complex and inconsistent laws not only impact on freedom of speech as a result of the increased time and costs involved in ensuring compliance, but also make the laws less effective.

Privacy and related laws which impact on freedom of expression

Reviews have recently been undertaken by both the Australia Law Reform Commission and the South Australian Law Reform Institute in relation to creating additional privacy laws in the form of statutory causes of action for serious invasions of privacy. Free TV does not support any further layers of privacy protection being introduced in Australia at this time.¹²

¹¹ Review of the *Freedom of Information Act 1982* and the Australian Information Commissioner Act 2010, Recommendation 1.

¹² See for example, the submission of Free TV Australia to the ALRC inquiry 'Serious Invasions of Privacy in the Digital Era', available at http://www.alrc.gov.au/sites/default/files/subs/55._org_free_tv.pdf.

The existing privacy law framework is extensive. As indicated above, Free TV members are subject to a comprehensive set of privacy and related laws, some of which apply to organisations generally, some of which place specific limits on how broadcasters specifically can use material relating to a person's personal or private affairs, and some of which is contained in legislation regulating a diverse range of areas of law. For example, such laws include laws related to children and young persons, guardianship and administration laws, mental health laws, laws regarding court processes and procedures, laws regarding reporting on sexual offences, anti-discrimination and vilification laws, laws which restrict the reporting of particular events or matters, and family law legislation.¹³

These laws apply across Commonwealth, State and Territory jurisdictions, as well as at common law, and in industry codes of practice, including in particular, the Commercial Television Industry Code of Practice (the Code) and the ACMA's Privacy Guidelines (the Guidelines) for broadcasters. They often do not apply in a consistent or easily decipherable manner.

These laws collectively operate to limit the ability of the media to report on matters.

Conclusion

Free TV welcomes the Human Rights Commission's national consultation in relation to effectively protecting people's human rights and freedoms in Australia.

This is a timely opportunity to consider a range of laws and practices that operate to stifle the right to freedom of expression. Their impact is particularly significant when viewed collectively, and in the context of the fact that Australia does not have a bill or charter of rights that protects freedom of expression.

We look forward to engaging with the Government further in relation to how this important freedom can be more effectively balanced against other rights.

¹³ For a comprehensive list of laws that exist in Australian jurisdictions, see the Commercial Television Industry Code of Practice, Advisory Note, Privacy, January 2010.