



**Submission by  
Free TV Australia**

Justice and Community Safety Directorate

*Review of ACT Civil Surveillance  
Regulation Report*

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## EXECUTIVE SUMMARY

- Free TV welcomes the opportunity to comment on the recommendations of the *Review of ACT Civil Surveillance Regulation Report*.
- It is fundamental to a democratic society that surveillance devices laws strike an appropriate balance between protecting privacy and allowing the free flow of information to the public and upholding freedom of speech.
- Proper, proportionate and responsible use by the media of surveillance material can lead to news stories that uncover corrupt and illegal behaviour. It is therefore critical that any legislation in relation to surveillance devices does not curtail the media's ability to collect and publish material on matters that are in the public interest.
- Free TV believes that a broad general exception allowing collection and disclosure in the public interest is the best way to ensure an appropriate balance between competing interests is maintained.
- Free TV is concerned that the exemption proposed by the Review does not sufficiently covers the activities of the media. In particular, any exemption must:
  - Cover both the collection and disclosure of material obtained through surveillance;
  - Permit media organisations to receive any surveillance material (regardless of whether the surveillance was originally conducted to protect a public interest) if that communication to the media organisation is in the public interest;
  - Permit disclosure of material by the media, if the use, publication or communication of the material by the media organisation is in the public interest. Communication of the results of surveillance should not require a court order if that communication is in the public interest;
  - Ensure that any material obtained by surveillance is permitted to be communicated to and by a media organisation if there is a sufficient public interest in that communication, regardless of whether collection occurred in the public interest, in the protection of lawful interests, or even in contravention of the Act;
  - Apply to all facets of the media to ensure the inclusion of the ever-growing (and legitimate) online/social media forms of the media and freelance journalists.
- Any application of civil surveillance regulations to new technologies (such as visual observations, data and tracking collecting devices) should equally ensure that there are appropriate broad exceptions to allow the collection and publication of material in the public interest. In addition, any regulation of visual observation/optical surveillance should be clearly limited to hidden/covert

activities and should exclude devices that are used by media organisations which are not covert/hidden (such as regular news cameras and microphones)

- The revised definition of a “private conversation and activity” is uncertain. The definition should contain more clarity and should appropriately ensure that activities occurring in or observable from public places are not private. Similarly, the concept of consent must be clarified to ensure that implicit consent is permitted in certain circumstances.

## Introduction

Free TV Australia (**Free TV**) represents 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 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 watch by more than 13 million Australians.

Free TV welcomes the opportunity to respond to the *Review of ACT Civil Surveillance Regulation (Review)* and its recommendations for a new Surveillance Act.

It is important that any surveillance framework balances the competing interests of protection of privacy and the public interest, and gives the proper weight to the principles of freedom of speech and communication, and the free flow of information in the public interest. Proper, proportionate and responsible use by the media of surveillance devices can lead to news stories that uncover corrupt and illegal behaviour.

It is therefore critical that any legislation in relation to surveillance devices does not curtail the media's ability to collect and publish material on matters that are in the public interest.

## Public Interest Exception

### 1. Surveillance permitted in the public interest

Free TV welcomes the recommendation at page 11 of the Review, that the new Surveillance Act should allow surveillance when it is carried out to protect a public interest. However, Free TV is concerned the current recommendation in relation to the use of material obtained by a media organisation is too narrow for the reasons outlined below.

### 2. Communication to/by a media organisation

A general public interest exemption which sufficiently covers key activities of media organisations including collection, use and disclosure/publication of surveillance material is critical for the free flow of information in the public interest.

The current recommendation that "*Communication of the results of surveillance should require a court order unless the communication is to a media organisation subject to an appropriate code of conduct*" is not adequate protection for freedom of speech in the public interest for the reasons set out below.

#### Communication to and by media organisation - Scope

The relevant recommendation does not explicitly permit a media organisation to proceed to communicate any surveillance results that have been received, even if it is in the public interest to do so. Any framework must therefore specify that:

- Material must be able to be communicated not just *to* a media organisation, but also *by* a media organisation, where the latter communication is in the public interest. This ability of a media organisation to disclose should extend to the use, communication and publication of the material or information derived from the material where such disclosure is in the public interest;

- Any material obtained by surveillance (whether in the public interest, in the protection of lawful interests, or even in contravention of the Act) should be explicitly permitted to be communicated to and by a media organisation if there is a public interest in that communication.

The Australian Law Reform Commission (**ALRC**) has recognised that the circumstances that justify the communication of information obtained through surveillance may be different from those that justify the use of a surveillance device<sup>1</sup>. This should be recognised in the reforms.

It is relevant to note that recording or publishing material when it is in the public interest does not mean that the media can do whatever it likes. The prerequisite for a public interest to be present before a journalist or broadcaster can acquire or publish surveillance device material means that careful consideration is exercised before any such activities are undertaken.

Where relevant cases have come before the courts in other jurisdictions, public interest has always been construed narrowly.<sup>2</sup> The Privacy Guidelines of the Australian Communications and Media Authority, which are applied in relation to privacy complaints made against broadcasters, are similarly narrow.<sup>3</sup>

There are many examples of where surveillance devices have been used to capture material which broadcasters have subsequently published to advance the public interest, including:

- (a) the exposure of live baiting in greyhound racing;
- (b) the exposure of black market workers run by unscrupulous labour hire contractors operating throughout the country on farms and in factories;
- (c) the exposure of ongoing issues concerning the welfare of Australia's live exports overseas;
- (d) threatening, intimidating and offensive behaviour by neighbours;
- (e) a person promising jobs and visas as part of an illegal immigration scam;
- (f) the exposure of negligent and sub-standard conditions in a nursing home; and
- (g) salespeople misrepresenting the benefits of particular products, particularly in relation to medical products.

This list is not exhaustive. In many instances, the publication and broadcasting of such material has led to criminal investigations, convictions, amendments to laws and, in many circumstances, significant changes to public attitudes.

### **Definition of media organisation**

The definition of 'media organisation' in a new Surveillance Act should be sufficiently broad to adequately encompass the various arms and manifestations of the media and reflect how the media currently operates (such as the use of freelance journalists).

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<sup>1</sup> Paragraph 14.61 of "Serious Invasions of Privacy in the Digital Era (ALRC Report 123)" the ALRC, Published on 3 September 2014.

<sup>2</sup> See, for example, *Channel Seven Perth Pty Ltd v S (A Company)* [2005] WASC 175 (10 August 2005)

<sup>3</sup> See: [http://www.acma.gov.au/webwr/\\_assets/main/lib100084/privacy\\_guidelines-dec2011.pdf](http://www.acma.gov.au/webwr/_assets/main/lib100084/privacy_guidelines-dec2011.pdf)

A suitable definition is contained at section 6 of the *Privacy Act 1988* (Cth) and at s3 of the *Surveillance Devices Act 2016* (SA) (**SA Act**), which both define *media organisation* as:

*an organisation whose activities consist of or include the collection, preparation for dissemination or dissemination of the following material for the purpose of making it available to the public:*

- (a) *material having the character of news, current affairs, information or a documentary;*
- (b) *material consisting of commentary or opinion on, or analysis of, news, current affairs, information or a documentary”.*

The definition will encompass well-established and entirely genuine providers of news and current affairs, such as:

- Yahoo 7, who provide online content and publishes legitimate news articles and opinion pieces on its website, but does not hold a Commonwealth licence;
- The Guardian Australia and The West Australian newspaper, despite that it is not a constituent body of the Australian Press Council.

#### **“Subject to an appropriate code of conduct”**

It is not clear how this part of the recommendation will be operationalised, however as a general principle, any public interest exception for the media should be construed broadly.

In relation to Free TV members, the Commercial Television Industry Code of Practice (**Code**) and ACMA’s Privacy Guidelines for broadcasters (**Guidelines**), which supplement the Code, provide a strong level of privacy protection for individuals.

In particular, clause 3.5.1 of the Code states that, in broadcasting a news program or current affairs program, a broadcaster must not broadcast material relating to a person’s personal or private affairs or which invades a person’s privacy, unless there is a public interest reason for the material to be broadcast, or the person has provided implicit or explicit consent for the material to be broadcast.

### **3. Broad public interest exception for communication**

Free TV believes that the proposed recommendation which only permits a media organisation to receive the results of surveillance is too restrictive. The reforms should provide for a broader scope for communication of material in the public interest, without the requirement of a court order.

### **4. Material received as evidence**

There is currently no exception, in the Listening Devices Act or the proposed recommendations, which allows the publication or communication of material that has been taken or received in public as evidence in a proceeding. This is problematic as media organisations who broadcast material on the public record should not be at risk of prosecution.

## **Introduction of new surveillance activities**

If the Act is amended to cover a broader range of activities such as visual observation, data and tracking collecting devices, it is even more essential that an appropriately broad public interest exemption is included in the Act.

In particular, for reasons stated above, a provision should be included to allow media organisations to receive *as well as use, publish and communicate* material in the public interest. In addition, any regulation of visual observation/optical surveillance should be clearly limited to hidden/covert activities and should exclude devices that are used by media organisations which are not covert/hidden (such as regular news cameras and microphones) and other circumstances where optical surveillance is disclosed.

### **New definition of private activity/conversation**

The recommendation at page 8 of the Review states that:

*The Surveillance Act should make it clear that private conversations or activities are limited where parties can reasonably expect to be overheard or observed by others.*

A reasonableness test to determine whether a conversation or activity is private would produce too uncertain a result for any person attempting to comply with the legislation.

More specifically, there is no distinct yardstick to discern what a private conversation or activity vis-a-vis a public conversation or activity. The lack of clarity in the definition leaves open the possibility that conversations and activities taken in public places may nevertheless be private activities.

Similarly, the definition does not clarify whether an activity occurs on private land is enough to render an activity private for the purposes of the definition. A person would be left to determine whether any activity occurring on that land is private by reference to inanimate objects such as the height of a fence, the transparency of a fence, signs, whether doors or sheds or other buildings are open or closed and whether the activities appear to be occurring behind buildings or objects so as to obscure them from passers-by.

Accordingly, the legislation should clarify that, the definition of a private conversation or activity:

- should specifically exclude activities occurring in a public place; and
- may in some instances exclude activities occurring on private land in some circumstances (for example, if those activities are visible from public places - through a low or transparent fence, open gates, glass).

### **Consent**

The recommendation regarding consent in the context of surveillance activities at page 12 of the Review sets out a number of requirements for a valid consent.

Any formal provisions must also recognise that implicit consent may be given as an acceptable way of consenting, for example, if a person appears at a place where it is clear that they will be visible or heard.

The framework should also address the provision of both explicit or implicit consent by parents on behalf of a minor.

## **Conclusion**

Free TV appreciates that the Review's recommendations are directed towards ensuring that material can be recorded in the public interest and that a media organisation can receive material without a court order.

However, specific provision must be made in the new Surveillance Act to ensure that these principles are given practical effect and operate to ensure that the media is able to collect, receive, use, publish and communicate material where there is a public interest.

We look forward to engaging further with the ACT Government on any implementation of the Review and providing comment on an exposure draft of the Bill in due course.