



**Submission by  
Free TV Australia**

Parliament of South Australia  
Legislative Review Committee

*Inquiry into Surveillance Devices*

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3 May 2013

## Introduction

Free TV Australia (Free TV) represents all of Australia's commercial free-to-air television broadcasters. Our members provide nine channels of content across a broad range of genres, as well as rich online and mobile offerings. These services are free to view. The value of commercial free-to-air television to all Australians remains high. On any given day, free-to-air television is watched by more than 14 million Australians.

Free TV welcomes the opportunity to make a submission to the Legislative Review Committee's inquiry into surveillance devices, in the context of the *Surveillance Devices Bill 2012* (the Bill).

The right to privacy is not an absolute right. It competes with other rights and interests, such as the need for individuals to protect their legitimate interests, and the freedom of the media to seek out and disseminate information of public concern. These tensions are reflected in the Committee's terms of reference.

While we agree that surveillance devices should be subject to regulation, it is important to recognise that proper, proportionate and responsible use of surveillance devices can lead to news stories that uncover corruption, illegal behaviour, or behaviour that endangers the community, among other matters.

The inclusion of a public interest exception represents a sensible balance between the need for appropriate rules around the use of surveillance devices to protect an individual's privacy, and the need for journalists to occasionally use such devices as part of their role in providing important news and current affairs coverage. Material captured by an individual using a surveillance device should also be able to be utilised by a journalist or media organisation in communicating a matter of public interest to the community.

Free TV members have a number of concerns with the Bill, including:

- the narrowing of the public interest exception that applies to the use of listening devices;
- the restrictions around the publication or communication of material obtained using a surveillance device; and
- the lack of any public interest exception for the use of optical surveillance devices.

## No need for reform

In the first instance, there is no demonstrated public policy failure that warrants the introduction of new legislation.

Free TV is not aware of any evidence that the *Listening and Surveillance Devices Act 1972* (the 1972 Act) is ineffective or inadequate. The fact that there have been no prosecutions under the 1972 Act does not mean that it needs updating. On the contrary, the absence of any prosecutions may well indicate that the 1972 Act sets clear boundaries and deterrents that are functioning effectively to regulate the use of surveillance devices in South Australia.



## Existing protections

Free TV takes community and legal standards regarding the privacy of individuals very seriously.

Commercial free-to-air broadcasters must comply with detailed Commercial Television Industry Code of Practice provisions designed to protect individuals' privacy. In particular, the Code states that material relating to a person's personal or private affairs must not be broadcast unless there is an identifiable public interest reason (Clause 4.3.5).

The Australian Communications and Media Authority (ACMA) is empowered to investigate complaints under this Code and a range of substantive enforcement provisions apply.

In addition, there are a broad range of state and commonwealth statutes which protect against inappropriate or unfair means of gathering or disclosing personal information and images.

The recent passage of the *Summary Offences (Filming Offences) Act 2013* (SA) provides further protections for individuals in South Australia in relation to humiliating, indecent or invasive filming (including covert filming).

Given these existing protections and the absence of any public policy failure, there is no demonstrated need to increase the level of regulation in the manner proposed by the Bill.

## Legitimate use of surveillance devices

There are occasions when a member of the public, a "whistle-blower", or a journalist will use a surveillance device in the public interest.

Material obtained using a surveillance device (whether obtained by a broadcaster or a third party) may be broadcast to disseminate the information to the public.

The dissemination of this information can reveal rogue or illegal behaviour of high public value and may instigate significant public policy reform.

A recent example of this includes the footage broadcast on ABC's Four Corners in 2011 showing the slaughter of cattle in Jakarta abattoirs before the cattle were stunned. This footage prompted an investigation by the Federal Department of Agriculture to establish the origin of the cattle and whether the slaughterhouses filmed were part of the approved abattoir system.

As a result of the broadcast of this footage, the Australian Government banned live cattle exports while it conducted its investigation and only resumed trade under strict new guidelines guaranteeing the welfare of all livestock leaving Australia<sup>1</sup>.

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<sup>1</sup> ABC news: <http://www.abc.net.au/news/2012-02-28/new-footage-shows-cruelty-at-indonesian-abattoir/3858230>



In some other cases, footage is provided to broadcasters showing the commission of an offence and its broadcast is requested to assist in identifying and locating the perpetrator of the offence.

If the Bill were to pass in its current form, the filming and broadcast of such material would be a serious criminal offence, regardless of the public interest value.

It would be impossible to devise an exhaustive list of permissible instances for the use of a surveillance device or the broadcast of material obtained via a surveillance device.

A broad exception or defence for such uses in the public interest (or in the case of an individual, to protect their lawful interests) will allow for a practical and flexible approach that can capture all possible eventualities.

### **Public interest exceptions essential**

If the Bill is to proceed, it must be amended to include public interest exceptions for use and publication in the same terms as the 1972 Act.

Legitimate journalists (and film or documentary makers) should be able to use surveillance devices as part of their role in investigating and reporting on stories where there is a genuine public interest. Similarly, the media should be able to publish material that has been obtained by a third party using a surveillance device, if it is in the public interest to do so.

Free TV members are judicious in the use of surveillance devices in obtaining and broadcasting material. The absence of any actions under the 1972 Act reflects the cautious approach taken by the media in limiting the use of such devices to issues where there is a demonstrable public interest.

The maintenance of the public interest exception as set out in the 1972 Act is therefore critical to ensure that these activities can continue.

Free TV urges the Committee to recommend amendments to the existing Bill to address these concerns.

### **Narrowing of public interest exceptions for use of listening devices**

The 1972 Act includes a provision at section 7(1)(b), which makes it lawful for a listening device to be used, *inter alia*, in the public interest, so long as the person using the listening device is a party to the conversation.

The Bill narrows this exception substantially. Clause 4(2)(b) of the Bill states that a listening device can only be used by a party to a conversation if they are the victim of an offence alleged to have been committed by another party to the conversation *and* it is in the public interest.

This will criminalise the use of listening devices by journalists, even where their activities are undertaken on behalf of a victim of an offence or relate to a matter of substantial public concern.

We also note that the test at clause 4(2)(b)(i) is vague and uncertain, as it is not clear who must be alleging the commission of the offence (the police, a

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member of the public, or the party to the conversation/victim) and the status or nature of the allegation.

The Bill also removes the exception that allows individuals to use a listening device to protect their lawful interests where there is no alleged criminal offence – for example, in relation to civil rights (such as employment), or in relation to family law matters. The use of listening devices in such circumstances should remain lawful.

If the Bill is to proceed the wording of the 1972 Act in relation to the permissible use of listening devices should be reinstated.

### **No public interest exception for publication or communication**

Section 7(3) of the 1972 Act restricts the communication or publication of material derived from the lawful use of a listening device to certain circumstances, including if it is in the public interest.

This means that although the 1972 Act allows the use of listening devices in a broader range of circumstances than the Bill, media organisations are only able to publish or communicate material obtained by themselves or others lawfully using a surveillance device if it is in the public interest to do so.

In contrast, the Bill does not contain any provision governing the publication or broadcast of material obtained from the lawful use of a surveillance device (although lawful use under the Bill is very limited in any event).

Clause 8 of the Bill deals with the broadcast or communication of material obtained using a surveillance device unlawfully. Relevantly it would only allow for general publication by the media where both parties have consented. While this is no different to section 5 of the 1972 Act, the consequences are obviously far greater because the scope of lawful use of listening devices under the Bill is so much narrower.

We note that under clause 8(3) of the Bill, the communication or publication of knowledge (as opposed to material, such as a recording) that has not been obtained in contravention of Part 2 of the Bill is acceptable, even if the knowledge was also obtained in a manner that was a contravention.

However, often a recording which contains a fact or knowledge (whether visual or aural) will have substantially more meaning, impact and gravitas for an audience than the mere reporting of knowledge. This is particularly relevant where the recording may reveal the occurrence of an event that is unlikely or unexpected.

The Bill should be amended to allow for communication and publication of material obtained using a listening or optical surveillance device where it is in the public interest. It may be appropriate to restrict this exception to instances where the use of the surveillance device was lawful, but only if the usage exceptions in the Bill are expanded to include public interest and protection of lawful interests.

Also in relation to clause 8, we note that there is no exception to allow the publication or communication of material that has been taken or received in public as evidence in a proceeding, which was present in section 7(3)(e) of

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the 1972 Act. This wording should be reinstated to ensure that media organisations who broadcast material on the public record are not at risk of prosecution.

### **Introduction of optical surveillance**

Free TV is not opposed to the introduction of regulations around the use of optical surveillance devices. However, exceptions should be provided to allow for use in the public interest, or for a person to protect their lawful interests.

The proposed definition for optical surveillance device will encompass camera equipment used by the media. Free TV is concerned that the proposed prohibition on the use of such devices is very broad and will criminalise legitimate news gathering by its members.

For the reasons stated above, a provision should be included in clause 8(2) of the Bill, to permit the use, installation and maintenance of surveillance devices on/within premises or a vehicle without consent where it is in the public interest.

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