Submission by Free TV Australia

Australian Law Reform Commission

Traditional Rights and Freedoms – Encroachments by Commonwealth Laws

27 February 2015

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EXECUTIVE SUMMARY

- Free TV welcomes the Australian Law Reform Commission's Issues Paper on the encroachment of Commonwealth laws on traditional rights and freedoms.
- The right to freedom of speech 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 a number of Commonwealth laws unreasonably encroach on the right to freedom of speech, which we outline in this submission, including:
    - National security laws;
    - Defamation laws;
    - Freedom of Information laws;
    - Surveillance devices laws; and
    - Privacy and related laws.
- Their impact is particularly significant when viewed collectively.
- Free TV looks forward to engaging with the Australian Law Reform Commission further in relation to how this important freedom can be better protected and more effectively balanced against other rights.

Introduction

Free TV Australia (Free TV) welcomes the opportunity to respond to the Australian Law Reform Commission's Issues Paper, '*Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*' ("Issues 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 speech. The right to freedom of speech includes the freedom to 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 Commonwealth laws in order to achieve a more robust right to freedom of expression for the media and the public. As such, Free TV will focus on responding to Question 2 of the Issues Paper, which seeks views on Commonwealth laws which unjustifiably interfere with freedom of speech, and why those laws are unjustified.

The importance of the right to freedom of expression

The right to freedom of speech (or freedom of expression), 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 speech is not enshrined in legislation, while laws which by their nature encroach on the freedom of speech 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 speech is appropriately balanced against other rights or freedoms, there are a number of areas

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

where the right to freedom of speech has been unnecessarily and unjustifiably curtailed.

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

National security laws

Free TV considers that a number 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.

While Free TV recognises the importance of protecting Australia's national security, and the safety of the personnel involved in intelligence and national security operations, some of the recent amendments go beyond what is necessary for national security and are unjustified.

1. National Security Legislation Amendment Act (No. 1) 2014

The *National Security Amendment Act (No. 1) 2014* ("the National Security Act") which was passed by both houses of the Parliament in October 2014, made changes to the national security legislative framework, primarily to the *Australian Security Intelligence Organisation Act 1979* (ASIO Act), and the *Intelligence Services Act 2001* (IS Act), which Free TV considers encroach unjustifiably on freedom of speech.

Free TV is concerned that offences created by the Act which relate to the unauthorised disclosure of information are punishable by a term of imprisonment of up to 10 years.[2] While 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, new section 35P of the ASIO Act 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 the 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);

[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.

- 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) Act 2014

Similarly, the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* ("the Foreign Fighters Act"), which was passed by both houses of the Parliament on 30 October 2014, created a range of offences which risk criminalising the conduct of journalists in carrying out their jobs.

Free TV has serious concerns in relation to the resulting new section 119.7 of the *Criminal Code*, 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 new section 3ZZHA of the *Crimes Act 1914*, 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.

These new provisions which were incorporated into the national security legislative framework by the National Security Act and the Foreign Fighters Act create a significant and unjustifiable interference with freedom of speech. They will act as a significant deterrent to reporting of national security matters.

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

The *Telecommunications (interception and access) Amendment (mandatory data retention) Bill 2014* ("the Data Retention Bill") follows on from the National Security Bill and the Foreign Fighters Bill as the Government's third tranche of national security legislation. The broad reaching provisions of this Bill, which has been referred to the Joint Parliamentary Committee on Intelligence and Security, will further constrain the work of journalists in reporting on public interest matters.

This Data Retention 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]

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

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.

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 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.[5] For these reasons we have recommended to the Committee that:

- The legislation must clearly limit access to metadata for the purposes of national security and criminal law enforcement only;
- A media exception should apply so that metadata cannot be used to identify journalists and their sources, or alternatively a warrant must be required if an agency is seeking access to the metadata of journalists and journalists' sources;
- The persons empowered with authorising requests for access to data and disclosure of data must be limited to the most senior official of an authorised agency:
    - 'authorised officer' should be limited to the Commissioner of Police or the Deputy Commissioner, or the head or deputy head of an enforcement agency; and
    - 'eligible person' should be limited to the Director-General of Security or the Deputy Director-General of Security; and
    - The words 'he or she is satisfied' should be removed from section 174(3) of the TIA Act so that the subjectivity involved in granting authorisations is reduced.

Annexures A – C contain submissions made by Free TV as part of Australia's Right To Know coalition, which further detail its concerns in relation to the National Security Act, the Foreign Fighters Act and the Data Retention Bill.

Defamation laws

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 avoid the risk of being embroiled in lengthy legal proceedings.

This situation is exacerbated by the fact that defamation laws do not adequately account for publication on the internet. 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

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

outdated and ill-equipped to deal with online publications, and as a result impact on freedom of expression. For example:

Single publication rule

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's previously stated position that the UK provision may provide a useful model for defamation law in Australia as well.[6]

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 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]

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[6] ALRC Report 123, *Serious Invasions of Privacy in the Digital Era*, Recommendation 10-7.

[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).

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 stifles 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;
- 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]

Annexures D and E contain submissions made by Free TV as part of Australia's Right To Know coalition, which further detail its concerns in relation to FOI laws.

[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

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

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. Free TV considers that the impact on freedom of speech of these complex and inconsistent laws is unjustified.

Annexure F contains Free TV's submission to the Parliament of South Australia Legislative Review Committee's Inquiry into Surveillance Devices, which exemplifies its concerns in relation to surveillance devices legislation.

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]

The existing privacy law framework is extensive. 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

[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.

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.

Annexure G contains Free TV's submission to the ALRC's inquiry "*Serious Invasions of Privacy in the Digital Era*", which further demonstrates Free TV's concerns in relation to privacy and related laws.

Duplicate and inconsistent laws

Free TV is concerned that the complexity of the regulatory framework that applies to broadcasters as a result of overlapping legislative requirements in Commonwealth, State and Territory legislation and inconsistent laws across jurisdictions make those laws less effective and therefore further erode the freedom of speech. In addition to laws governing surveillance devices and privacy (outlined above), Free TV notes the following are examples of laws which detrimentally impact on the freedom of the media to report on matters:

- Laws governing suppression orders. For example, statutory provisions empowering courts and tribunals to make suppression orders prohibiting or restricting reporting of court proceedings vary significantly between jurisdictions in terms of the frequency with which they are made, the breadth and duration of such orders and the threshold that is required to be met before an order is made;[14]
- Legislative restrictions on the reporting of matters affecting or involving children and in family law matters;[15]
- Legislative restrictions on the reporting of matters affecting or involving sexual offences and sexual assault victims;[16]

[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.

[14] See also, Australia's Right to Know, *Report of the Review of Suppression Orders and The Media's Access to Court Documents and Information*, 13 November 2008.

[15] For example see: Family Law Act 1975 (Cth), s.121; Children and Young Persons (Care and Protection) Act 1988 (NSW); Children and Young People's Act 1999 (ACT); Youth Court Act 1993 (SA); Guardianship and Administration Act 1986 (Vic); Children (Care and Protection) Act 1987 (NSW); Children (Criminal Proceedings) Act 1987 (NSW); Guardianship Act 1987 (NSW); Mental Health Act 1990 (NSW); Juvenile Justice Act 1983 (NT); Child Protection Act 1999 (Qld); Children's Court Act 1992 (Qld); Juvenile Justice Act 1992 (Qld); Children's Protection Act 1993 (SA); Mental Health Act 1993 (SA); Child Welfare Act 1960 (Tas); Children and Young Persons Act 1989 (Vic); Crimes (Family Violence) Act 1987 (Vic); Victorian Civil and Administrative Tribunal Act 1998 (Vic); Children's Court of Western Australia Act 1988 (WA); Criminal Code (WA), s.635A.

[16] For example see: Evidence Act 1971 (ACT); Crimes Act 1900 (NSW); Evidence Act 1939 (NT); Criminal Law (Sexual Offences) Act 1978 (Qld); Evidence Act 1929 (SA); Summary Offences Act 1953 (SA); Evidence Act 2001 (Tas); Judicial Proceedings Reports Act 1958

- Legislative restrictions on the reporting of matters affecting or involving coronial inquiries;[17]
- Laws governing access to court records, documents and files. These laws are complex and vary considerably between jurisdictions. To provide an example, the procedural requirements for obtaining police records of interview in Victoria are particularly onerous: The media representative is required to file an application seeking release of the relevant record of interview, the application requires a supporting affidavit explaining the reasons why the interview should be released and what it will be used for, the prisoner needs to be served with a copy of the application and affidavit, and proof of service then needs to be provided to the Court. The prisoner then has the right to oppose the release of the interview in writing and in the event that it is so opposed, the matter is listed before a judge. These procedural requirements, costs and the processing times involved act as a deterrent to reportage.[18]

Conclusion

Free TV welcomes the Australian Law Reform Commission's Issues Paper in relation to the encroachment of Commonwealth laws on traditional rights and freedoms.

A range of Commonwealth laws currently unjustifiably stifle the right to freedom of speech in Australia. 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. It is timely to now review these laws.

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

(Vic); Supreme Court Act 1986 (Vic); County Court Act 1958 (Vic); Magistrates Court Act 1989 (Vic); Evidence Act 1906 (WA).

[17] Evidence Act 1971 (ACT); Coroners Act 1980 (NSW); Coroners Act 1993 (NT); Evidence Act 1939 (NT); Coroners Act 1958 (Qld); Coroners Act 1985 (Vic); Coroners Act 1996 (WA)

[18] *Crimes Act 1958 (Vic)*, s 464JA and 464 JB.

Annexure A

6 August 2014

Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House
CANBERRA ACT 2600

By email: pjcis@aph.gov.au

Dear Secretary,

The media organisations that are parties to this correspondence – AAP, ABC, APN, ASTRA, Bauer Media, Commercial Radio Australia, Fairfax Media, FreeTV, MEAA, News Corp Australia, SBS, and The West Australian – welcome the opportunity to make this submission to the Parliamentary Joint Committee on Intelligence and Security regarding the *National Security Amendment Bill (No.1) 2014* (the Bill).
The right to free speech, a free media and access to information are fundamental to Australia's modern democratic society, a society that prides itself on openness, responsibility and accountability.

However, unlike some comparable modern democracies, Australia has no laws enshrining these rights. In the United States of America the right to freedom of communication and freedom of the press are enshrined in the First Amendment of the Constitution and enacted by state and federal laws. In the United Kingdom, they are protected under section 12 of the *Human Rights Act 1998*.
In the absence of such clear protections, there are a number of keystones which are fundamental in Australia to ensure journalists are able to do their jobs. These include:

- The ability for journalists to go about their ordinary business and report in the public interest without the real risk of being jailed;
- Protection of confidential sources;
- Protection for whistle-blowers; and
- An appropriate balance of power between the judiciary, the executive, the legislature and the media.

Limits on the ability of journalists to report on matters of national security must always be carefully considered and minimised. A recent report by Human Rights Watch, regarding the US, notes that:

> *This situation has a direct effect on the public's ability to obtain important information about government activities, and on the ability of the media to serve as a check on government. Many journalists said it is taking them significantly longer to gather information (when they can get it at all), and they are ultimately able to publish fewer stories for public consumption. …[T]hese effects stand out most starkly in the case of reporting on the intelligence community, national security and law enforcement – all areas of legitimate – indeed, extremely important – public concern.*[1]

The media organisations that are parties to this submission do not seek to undermine Australia's national security, nor the safety of the men and women involved in intelligence and national security operations.

Over many years there has been useful dialogue between security officials and producers and editors of media organisations that has led to considered outcomes. Journalists and editors have demonstrated over

[1] Human Rights Watch in conjunction with the American Civil Liberties Union (2014) *With Liberty to Monitor All* at page 4; www.hrw.com

time that such matters can be approached in a reasoned and responsible manner. We hold that this approach should continue to be preferred over attempts to codify news reporting and criminalise journalists for doing their jobs.

We are concerned that the Bill has been characterised as being similar to the controlled operations regime in Part IAB of the *Crimes Act 1914* (the Crimes Act).[2] There are significant differences between the federal police controlled operation provisions and the new special intelligence operation provisions, particularly the significantly longer jail terms under the Bill. The existence of controlled operation provisions in the Crimes Act does not automatically justify the imposition of similar provisions in the context of special intelligence operations.

We are concerned that the Bill includes provisions that erode freedom of communication and freedom of the press. These concerns are set out in more detail below.

JAILING JOURNALISTS FOR DOING THEIR JOBS

The Bill includes proposed section 35P(1) to the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act), which creates an offence for a person disclosing information relating to a special intelligence operation (SIO). A further offence is created (at proposed section 35P(2)) for a person who discloses such information with the intent to endanger the health of a person, or prejudice the conduct of the SIO, or where the information has that effect.

The insertion of proposed section 35P could potentially see journalists jailed for undertaking and discharging their legitimate role in a modern democratic society – reporting in the public interest. Such an approach is untenable, and must not be included in the legislation.

This alone is more than adequate reason to abandon the proposal as the proposed provision significantly curtails freedom of speech and reporting in the public interest.

This is particularly so as the proposed section 35P prohibits any disclosure of information relating to an SIO, not just reporting in the public interest.

In addition, SIOs by their very nature will be undisclosed. This uncertainty will expose journalists to an unacceptable level of risk and consequentially have a chilling effect on the reportage of all intelligence and national security material. A journalist or editor will simply have no way of knowing whether the matter they are reporting may or may not be related to an SIO. We express this as information that 'may or may not be' related to an SIO because:

- It may or may not be known if the information is related to intelligence operations, and whether or not that intelligence operation is an SIO;
- *'relates to'* is not defined and therefore the breadth of relevance is unknowable;
- It is unclear whether SIO status can be conferred on an operation retrospectively – i.e. if information has been 'disclosed,' whether any operation that it may be associated with or related to can be retrospectively allocated SIO status; and
- It is likely that clarity about any of these aspects would only come to light <u>after</u> information is disclosed – particularly in the case of reporting in the public interest.

[2] Explanatory Memorandum to the Bill, para. 463.

To illustrate, the discloser may not be aware that the information relates to an SIO, nor whether the information is core/key/central to an SIO, and even less aware as to where the boundaries may lie for information that may or may not 'relate to' an SIO.

So the discloser – who may be a journalist, doing what they are legitimately entitled to do as part of their job – could be jailed for disclosing information that is related to an SIO, even if they were not aware of it at the time, or it was not an SIO at the time of the report.

This uncertainty is intensified as the proposed criminal offence is based on the disclosure of information that relates to an SIO – regardless of to whom the disclosure was made. For example, a journalist who checks with his/her editor or producer regarding the information and/or the story could be jailed for responsibly doing their job, even if the information is not ultimately broadcast or published.

To illustrate this further, if the producer or editor disclosed the information to anyone in the course of making an editorial decision, then the source, the journalist and the editor could all be jailed. The conversations that are currently able to be had as media outlets make responsible decisions about disclosure in the public interest, would be denied under the proposed legislation, because any disclosure by anyone – to anyone – would be a criminal offence.

Further, the aggravated offence applies wherever the disclosed information has the effect of prejudicing the conduct of an SIO and does not require intent. This means that journalists may find themselves liable for a 10 year jail sentence when they had no idea that the information was the subject of an SIO, and the disclosure had an unintended consequence, unforeseeable to someone who was unaware of the SIO status.

It is also observed that it is the intelligence agency that determines an intelligence operation as an SIO, and would also determine the 'related' nature of the information to the SIO.

We reflect also on the Foreward of the Committee's *Report of the Inquiry into Potential Reforms of Australia's National Security Legislation*[3] particularly the references to the Boston bombings and the murder of a British Soldier on the streets of London. These incidents are indeed concerning. If these incidents, or incidents such as these, were or became the subject to an SIO, then under the proposed amendments, journalists may be unable to report – including on incidents that may have been witnessed by a small or large number of members of the public, for fear of arrest.

In summary, the introduction of a serious criminal offence, punishable by jail, for journalists doing their job is strongly opposed. This in turn also has a chilling effect on freedom of speech and freedom of the media, hindering news gathering to the detriment of Australia's place amongst modern democracies.

LACK OF PROTECTION FOR WHISTLE-BLOWERS

The parties to this submission note that the insertion of section 35P to the ASIO Act also entrenches the currently inadequate protections for whistle-blowers regarding intelligence information. As a foundation of freedom of communication, we draw attention to this matter and highlight that it further erodes freedom of speech and freedom of the media in Australia.

Specifically, proposed section 35P makes it a criminal offence punishable by jail, for anyone, including a whistle-blower, to disclose information that relates to an SIO.

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3 http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=pjcis/nsl2012/report.htm at *vii*

The effect of proposed section 35P on potential whistle-blowers will be similar to those raised in relation to journalists, particularly - that a whistle-blower may or may not know if information relates to an SIO. This in turn would likely discourage whistle-blowing – particularly in the absence of protections, and would leave any whistle-blower facing the real risk of jail.

If a whistle-blower were to emerge from the ranks of intelligence personnel, then the Bill now imposes a 10 year jail sentence for disclosing information – up from 2 years – further discouraging whistle-blowing.

Notwithstanding the measures in the Bill, the other legislation that is designed to provide protections to whistle-blowers, the *Public Information Disclosure Act 2013* (PID Act), provides no protection to intelligence personnel if they make an external or public disclosure (sections 26 and 41). Media organisations and experts such as Professor A.J. Brown of Griffith University urged this to be changed when the PID Act was debated as a Bill in 2013. In our submissions to the House Standing Committee on Social Policy and Legal Affairs and the Senate Standing Committee on Legal and Constitutional Affairs on that matter, we said:

> *Again, there is no justification for a broad exclusion regarding disclosable conduct concerning intelligence agencies. There may well be instances where corruption or maladministration occurs in these agencies, the disclosure of which will not affect intelligence or security matters. These agencies, which are responsible for significant matters of public interest, should be subject to the same level of accountability as the rest of government.*

This Bill further impairs the lack of protection for persons, including intelligence agency personnel, driven to resort to whistle-blowing in the public domain. It is now unequivocal that the whistle-blower and the person/s who make the information public – most likely a journalist doing their job and reporting in the public interest – will face time in jail. Such an approach does not serve a free and open society and a modern democracy.

In addition to these two key issues, there are a number of consequences of the Bill which will have the potential to undermine a free media. These are:

UNDERMINING CONFIDENTIALITY OF SOURCES

i. <u>Expanding definition of computer to include networks</u>
The Bill expands the definition of computer under the ASIO Act to extend to 'computer networks' as it applies to search warrants, computer access warrants, identified person warrants and foreign intelligence warrants. We have serious concerns that this could expose the computer networks of media organisations to monitoring, and therefore undermine confidentiality of journalists' sources and therefore news gathering.

ii. <u>Enabling access to third party computers</u>
The current section 25(5)(a) of the ASIO Act provides the power under a search warrant to add, delete, or alter other data (that is not relevant to the security matter) to obtain access to data that is relevant to the security matter. This is being amended to also include the power to copy.

Additionally, the ASIO Act will also be amended (sections 25(6) and 25A(5)) to enable the use of third party computers or 'communication in transit' for the purpose of access data on the target computer.

These amendments, in combination with the extension of the definition of computer to computer network, and the ability to add, delete, alter, and now copy data that is not relevant to the security

matter (albeit for the purpose of accessing data that is relevant to the security matter and the target) amplifies the risks to the fundamental building blocks of journalism including undermining confidentiality of sources and therefore news gathering.

EXPANDING THOSE WHO CAN EXECUTE WARRANTS, WARRANTS FOR ACCESS TO THIRD PARTY PREMISES AND USE OF REASONABLE FORCE

The Bill amends sections of the ASIO Act to:

- Authorise a class of persons able to execute warrants rather than listing individuals (section 24);
- Clarify that search warrants, computer access warrants and surveillance device warrants authorise access to third party premises to execute a warrant (sections 25, 25A and new section 26B); and
- Authorise the use of reasonable force at any time during the execution of a warrant, not just on entry (sections 25, 25A, 26A, 26B and 27J).

The expansions of these aspects of the ASIO Act, in aggregate, and in addition to matters raised previously in this submission, are of major concern. These amendments increase the risk to all that media organisations encompass, including all employees, information and intellectual property which in turn curtails freedom of speech.

We urge the Parliament to consider this impact of the proposed amendments before proceeding with the Bill.

Annexure B

3 October 2014

Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House
CANBERRA ACT 2600

By email: pjcs@aph.gov.au

Dear Secretary,

The media organisations that are parties to this correspondence AAP, ABC, APN, ASTRA, Bauer Media, Commercial Radio Australia, Fairfax Media, FreeTV, MEAA, News Corp Australia, SBS, The Newspaper Works and West Australian News – welcome the opportunity to make this submission to the Parliamentary Joint Committee on Intelligence and Security regarding the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (the Bill).

We note the very short timeframe provided for submissions on the Bill, which is both complex and extensive.

The parties to this submission regard free speech, a free media and access to information as fundamental to Australia's modern democratic society that prides itself on openness, responsibility and accountability.

However, unlike some oft pointed to modern democracies such as the US and UK, Australia does not have similar 'rights' to freedom of communication and freedom of the press as those that are enshrined in the First Amendment of the United States' Constitution and enacted by state and federal laws, and s12 of the *Human Rights Act* respectively.

To safeguard the more threatened freedoms in Australia, there are a number of keystones that are fundamental to ensure journalists are able to do their jobs. These include the ability for journalists to go about their ordinary business and report in the public interest without the risk of being jailed, the protection of confidential sources, protection for whistle-blowers, and the maintenance of an appropriate balance of power between the judiciary, the executive, the legislature and the media.

That being the case, the media organisations that are parties to this submission contend that our producers, editors and journalists do not seek to undermine Australia's national security, nor the safety of the men and women involved in intelligence and national security operations.

Rather, the opposite is the case. Over many years there has been useful dialogue between security officials and producers and editors of media organisations in certain circumstances which have led to considered outcomes. We hold that this approach should continue to be preferred over attempts to codify the decisions relating to news reporting and criminalise journalists for doing their jobs.

We are therefore concerned that the Bill includes provisions that erode freedom of communication and freedom of the media, including but not limited to the issues detailed below.

1. ADVOCATING TERRORISM

Proposed section 80.2C of the *Criminal Code* provides that a person commits an offence if they advocate (defined as 'counsels, promotes, encourages or urges') the doing of a terrorist act and the person engages in that conduct reckless as to whether another person will engage in the act or commit terrorism.

The element of 'recklessness' and the ambiguity with the definition of 'advocates' has the potential to limit discussion, debate and exploration of terrorism in news and current affairs reporting, even in the context of the good faith defence (below).

We recommend that section 80.2C of the *Criminal Code* be amended to include an element of 'intention' in this offence, as required for the other offences set out in Subdivision C.

2. GENERAL EXCEPTION FOR GOOD FAITH REPORTING AND COMMENTARY IS CRITICAL

We note that section 80.3 of the *Criminal Code Act* provides a good faith defence in relation to a number of provisions, including the new offence of "advocating terrorism" in the Bill at proposed new section 80.2C.

Relevantly, section 80.3 states:

> *(1) Subdivisions B and C do not apply to a person who:*
> *…*
> *(f) publishes in good faith a report or commentary about a matter of public interest.*

In discussing the application of this defence to the new proposed section 80.2, the Explanatory Memorandum to the Bill states that:

> *The existence of a good faith defence in section 80.3 for the offence created by new section 80.2C provides an important safeguard against unreasonable and disproportionate limitations of a person's right to freedom of expression. The good faith defence ensures that the communication of particular ideas intended to encourage public debate are not criminalised by the new section 80.2C. In the context of matters that are likely to pose vexed questions and produce diverse opinion, the protection of free expression that attempts to lawfully procure change, points out matters producing ill-will or hostility between different groups and reports on matters of public interests is vital. The maintenance of the right to freedom of expression, including political communication, ensures that the new offence does not unduly limit discourse which is critical in a representative democracy.*
>
> *This legislative safeguard, taken together with the ordinary rights common to criminal proceedings in Australian courts, provide certainty that human rights guarantees are not disproportionately limited in the pursuit of preventing terrorist acts or the commission of terrorism offences.*[1]

[1] Explanatory Memorandum to the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* at paragraphs 139 and 140.

The parties to this submission agree with the sentiments expressed in these paragraphs – that free expression and the ability to report on matters of public interest is vital, and that certain human rights guarantees should not be disproportionately limited in the pursuit of preventing terrorism.

In that context, it is critical that a similar exception allowing the publication of good faith reports and commentary be applied to the provisions regarding the publication and communication of certain material, as discussed below.

3. 'PUBLISHING RECRUITMENT ADVERTISEMENTS' CRIMINALISES LEGITIMATE BUSINESS PRACTICES AND PEOPLE, OVERREACHES AND REQUIRES DEFENCES

New Division 119 of Part 5.5 of the *Criminal Code Act 1995* – section 119.7

The new Division 119 of Part 5.5 of the *Criminal Code Act 1995* addresses foreign incursions and recruitment. Proposed section 119.7 deals with the recruitment of persons to serve in or with an armed force in a foreign country; and proposed subsections 119.7(2) and 119.7(3) address *'publishing recruitment advertisements'*[2] which include news items that may relate to such matters.

- Lack of clarity about the 'news items' that are the source of recruitment or information about serving in or with an armed force in a foreign country

  There is a lack of clarity regarding 'what' it is – particularly at 119.7(3), and particularly as it relates to a news item – that is being targeted.

- Lack of clarity regarding who the offence is targeting

  There is also lack of clarity regarding 'who' the person is, or who is the target of the offence, that is committing the crime by 'publishing' the advertisement or news item.

  It could be envisaged that 119.7(2) and 119.7(3) may apply to – and not be limited to – the following separately, or a combination of any or all:

  - Persons associated with a media company's advertising arm or agency, including people responsible for advertisement bookings; and/or
  - Persons associated with a media company's newsroom or production; and/or
  - A director of a company; and/or
  - Editors, producers, journalists; and/or
  - Other persons that may be a party to any of the publishing/broadcast functions associated with (i) and (ii) of 119.7(2) and 119.7(3) and the above.

- Serious risk to innocent publication of advertisements and news items

  We have grave concerns regarding 119.7(3) and the implications for publication of legitimate advertisements and news.

  This is particularly the case when the advertisements or news items may, on face value, be benign and indeed legitimate, and also lack 'reckless' conduct in their publishing.

[2] http://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/s976_first-senate/toc_pdf/1420720.pdf;fileType=application%2Fpdf, p91

Further, the relevant information (such as location or travel information) or purpose (such as recruitment) of such advertisements or news items may only be known after the fact – and possibly still not known by the advertiser, or the person taking the ad booking, or the journalist or the editor. That is, it may only be known some time afterwards that the purpose of, or information contained in the ad or news item, or the location or place indicated in the ad or news item, or the travel information in an ad or news item, was instructive about or related to, serving in any capacity in or with an armed force in a foreign country.

To illustrate, if a broadcaster or publisher was to run an advertisement or a news item about a prayer meeting or a picnic, and it comes to pass that the event – which may or may not have been central to the advertisement or story – was used as cover for a recruitment drive or to disseminate information about, or direct people to another source of information about possible opportunities to serve in armed forces in foreign countries, then it is possible that any or all people involved in broadcasting or publishing the advertisement or story would be imprisoned for 10 years. This would be the case even if the conduct was not 'reckless.'

Such measures will almost certainly impact on the free flow of information in society – especially when the parties to the advertisements and news items are acting in good faith and communicating in the public interest. The serious implications of such a broad provision for news gathering and reporting, and also for legitimate business interests, cannot be overstated.

We recommend that 119.7(3) be removed from the Bill.

- Lack of defence to publishing recruitment advertising – no element of 'recklessness'

We note here that our concerns with subsection (3), which does not require the conduct to be *'reckless'* are heightened when there is no defence available to 'publishing recruitment advertisements' at subsections (2) and (3).

If the Government is minded to not remove 119.7(3) from the Bill, we recommend that the Government include defences for acts done in good faith and news reporting in the public interest at 119.7(4).

Such a provision could read as follows:
(4) Subsections (2) and (3) above do not apply to a person:
(a) who publishes in Australia:
(i) an advertisement in good faith; or
(ii) a report or commentary about a matter of public interest in good faith.

- Inconsistent penalties

We also note that the penalty for all 3 provisions at section 119.7 is imprisonment for 10 years. Specifically:

- Subsection (1) – Imprisonment for 10 years for someone that recruits (119.7(1) another person to serve in any capacity in or with an armed force in a foreign country;

- Subsection (2) – Imprisonment for 10 years for someone that publishes an ad or news item – both of which may be legitimately procured – that is for the purpose of recruiting persons to serve (in any capacity) with an armed force in a foreign country; and
- Subsection (3) – Imprisonment for 10 years for someone that publishes an ad or news item – both of which may be legitimately procured – that contains information about how to serve (in any capacity) with an armed force in a foreign country.

The lack of 'sliding scale' in the application of penalties seems disproportionate, particularly in the application to subsections (2) and (3) where the penalty applies to the indirect persons that may indirectly be associated with the 'reckless' conduct of publishing an ad or news item (at subsection (2)) and without 'reckless' conduct (at subsection (3)) relative to the same penalty applying to those directly responsible for recruiting foreign fighters (at subsection (1)).

We recommend that the defences outlined above are essential to differentiating the potential role of persons who may be inadvertently implicated in 'publishing recruitment advertisements' – recklessly or not – caught by the offences in undertaking their legitimate jobs in good faith and /or in service of the public interest in a democratic society.

We also recommend that the Government consider a sliding scale of penalties. This is in addition to the necessity to include defences as recommended above.

Notwithstanding these recommendations, our overarching recommendation is for subsection (3) to be removed from the Bill. In the alternative, the provision should include an exception for good faith reporting, commentary and advertisements.

- <u>Low threshold of subsection 119.7(2)</u>

  We are concerned with the low threshold of subsection 119.7(2), in that it would only need to be proved that a person – including but not limited to a director of a company, an editor, a journalist, a person responsible for advertisement bookings, a combination of any or all of these people, and possibly additional persons that may be a party to an advertisement or a news item; where 'consideration' was provided – was 'reckless' as to the purpose of the advertisement or news item (that being to recruit persons to serve in any capacity in or with an armed force in a foreign country).

We recommend that *'reckless'* be removed from 119.7(2)(b). We recommend that 'intention' be used instead.
Therefore, we recommend that 119.7(2)(b) be amended so that it reads: *'the person intended the publication of the advertisement or item of news to be for the purpose of recruiting persons to serve in any capacity in or with an armed force in a foreign country.'*

- <u>The breadth of 'procured by' and 'or any other consideration' infringes on legitimate news gathering</u>

  Both 119.7(2)(a)(ii) and 119.7(3)(a)(ii) stipulate that an element of the offence is that the person publishes in Australia *'an item of news that was procured by the provision or promise of money or any other consideration.'*

It is unclear from whom the promise of money or any other consideration needs to come from. For example, a news item that is licensed or purchased by a media organisation from a news agency and subsequently broadcast could be captured by this provision.

'Any other consideration' could be satisfied by buying a source, confidential or otherwise, a cup of coffee, or paying a taxi fare or train ticket – all of which are legitimate aspects of news gathering.

Also, and similar to comments made above, it is unclear what behaviour this qualification is targeting.

In the absence of clarity, combined with the breadth of the element and the fact that it would apply to legitimate news gathering, in our view the proposed element overreaches and infringes on legitimate news gathering processes.

We recommend that 'any other consideration' be deleted from 119.7(2)(b) and 119.7(3)(b).

4. DEFINITION OF JOURNALIST

New Division 119 of Part 5.5 of the *Criminal Code Act 1995* – section 119.2

Description of journalist requires amendment

The new division 119 of Part 5.5 of the *Criminal Code Act 1995* addresses foreign incursions and recruitment.

The signatories to this submission acknowledge the inclusion of an exception for journalists (at 119.2(3)(f)) to the offence of entering, or remaining in, declared areas (at 119.2(1)). Specifically, 119.2(3)(f) states that the exception applies if the person enters, or remains in the area for the purpose of:

> '*making a news report of events in the area, where the person is working in a professional capacity as a journalist or is assisting another person working in a professional capacity as a journalist.'*[3]

We are concerned that the terminology *'in a professional capacity'* is inconsistent with other well-established and well understood Commonwealth legislation which applies to journalists including at section 126G of the *Evidence Act 1995* whereby the term 'journalist' is not qualified, but is defined.

Additionally, we note that as specified in the legislation at 119.2(3) it is the defendant that bears the evidential burden in relation to the matter in that subsection. In our view, it would therefore be appropriate that the defendant bear the burden of proving that they entered, or remained in the area for the purpose of making a news report of events in the area, where they were working as a journalist or assisting another person working as a journalist.

[3] The Bill, p83

We recommend, having regard to the evidential burden, that the qualification *'in a professional capacity'* is not required and therefore both references to should be removed from 119.2(3)(f) and also references to this qualification in the Explanatory Memorandum at [223] and [833].

5. JAILING JOURNALISTS FOR DOING THEIR JOBS

Amendment to the *Crimes Act 1914* to include section 3ZZHA – Unauthorised disclosure of information

The insertion of section 3ZZHA to the *Crimes Act 1914* (the Crimes Act) would see journalists jailed for undertaking and discharging their legitimate role in our modern democratic society – reporting in the public interest. Such an approach is untenable. We recommend that this provision not be included in the legislation.

If, however, the Government is not minded to remove the provision, we request that a public interest exception be included at proposed section 3ZZHA(2).

Given that the Explanatory Memorandum of the Bill states that this '*mirrors a similar offence for disclosing information relating to the controlled operation (section 15HK of the Crimes Act)*'[4] we request that Bill be amended to incorporate a similar change to section 15HK of the *Crimes Act 1914*.

We recommend that 3ZZHA be removed from the Bill.

If the Government is minded to not remove 3ZZHA from the Bill, we recommend that the Government include a defence for a report that is in the public interest at proposed section 3ZZHA(2), and the Bill be updated to include an amendment to section 15HK of the *Crimes Act 1914* to provide for a defence for a report that is in the public interest.

6. LACK OF PROTECTION FOR WHISTLE-BLOWERS

Amendment to the *Crimes Act 1914* to include section 3ZZHA – Unauthorised disclosure of information

The parties to this submission note that the insertion of section 3ZZHA to the Crimes Act also entrenches the deficient protections for whistle-blowers regarding intelligence information. As a keystone of freedom of communication, we draw attention to this matter and highlight that it further erodes freedom of speech and freedom of the press in Australia.

Specifically, section 3ZZHA makes it a criminal offence punishable by jail for anyone, including a whistle-blower, disclosing information that relates to an application for; or the execution of; or a report in relation to; or a warrant premises occupier's notice or an adjoining premises occupier's notice prepared in relation to; a delayed notification search warrant.

Therefore the effect of section 3ZZHA would likely be to discourage whistle-blowing – particularly in the absence of protections and the real risk of jail – further impairing the lack of protection for persons driven to resort to whistle-blowing in the public domain.

[4] http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/s976_ems_d5aff32a-9c65-43b1-a13e-8ffd4c023831/upload_pdf/79502em.pdf;fileType=application%2Fpdf at [643]

7. JAILING JOURNALISTS AND A LACK OF PROTECTION FOR WHISTLE-BLOWERS

In combination, the two substantial issues outlined above means that a whistle-blower with no other avenue than whistle-blowing in the public domain and the person/s who make it public – most likely a journalist doing their job and reporting in the public interest – will face time in jail. As we stated in our previous submission to the Committee regarding the *National Security Amendment Bill (No 1) 2014*, such an approach does not serve a free and open democratic society well.

Annexure C

17 February 2015

Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House
CANBERRA ACT 2600

By email: dataretention@aph.gov.au

Dear Secretary,

The media organisations that are parties to this correspondence – AAP, ABC, APN News & Media, ASTRA, Bauer Media, Commercial Radio Australia, Fairfax Media, FreeTV, MEAA, News Corp Australia, SBS, The Newspaper Works and The West Australian – write regarding the *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (the Bill).

Following our submission and evidence to the Committee regarding the Bill, we consider it important to succinctly state our recommendations regarding the Bill, as there are elements of the Bill that we believe will lead to a chilling effect on reportage and undermine the public's right to know.

Our central concern, as articulated in our previous submission, is that the collection and storage of metadata could be accessed to identify journalists' sources, making it less likely that sources will share information (including corroborating information) and therefore have a chilling effect on reporting in the public interest. We therefore believe that there must be strict limits on the purpose for which metadata is accessed, restrictions on the agencies that can access this data, prohibitions on the data being used to identify journalists and sources, and increasingly robust authorisation process for accessing the data.

ISSUE 1 – ACCESS TO METADATA MUST BE STRICTLY LIMITED FOR THE PURPOSE OF NATIONAL SECURITY AND CRIMINAL LAW ENFORCEMENT ONLY

Access to metadata must be only for the purposes of national security and criminal law enforcement, and these purposes must be stipulated in the legislation.

The range of agencies and bodies that are able to access metadata for these purposes must also be limited. It must not be the case that metadata is able to be used for civil law enforcement.

Even with these limitations, we remain concerned that journalists and their sources may be pursued through access to metadata, particularly in efforts to uncover whistle-blowers. Our concerns in this regard are detailed in our submission to the Committee, and are addressed at Issue 2 below.

RECOMMENDATION 1 – Access to metadata must only be for the purposes of national security and criminal law enforcement.

It must be clearly stated in the legislation that the Ministerial declaration scheme (at section 176A(3)(b)) be based on demonstrated investigative and operational need for national security and criminal law enforcement only.

We are of the view that it is not sufficient to incorporate this in the Explanatory Memorandum to the Bill.

ISSUE 2 – METADATA MUST NOT BE USED TO IDENTIFY JOURNALISTS AND THEIR SOURCES

As outlined above, and detailed extensively in our submission to the Committee, we are concerned about the impact of large scale surveillance on news gathering.

This is due to the undermining of the confidentiality of sources, the lack of protection for whistle-blowers, and the risk of journalists being criminalised – all of which, separately and in aggregate, makes it increasingly difficult for news gathering and reporting in the public interest.

Further, the Bill exacerbates the detrimental impact of the first two tranches of national security legislation – the *National Security Amendment Bill (No 1) 2014* and the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* – on freedom of the media.

RECOMMENDATION 2 – METADATA MUST NOT BE USED TO IDENTIFY JOURNALISTS AND THEIR SOURCES.

2(a) – Given the interrelationship between the three tranches of national security legislation, a media exemption must be given to all three tranches.

- If the Committee does not adopt Recommendation 2(a), we recommend:

2(b) – A media exemption be given for the Bill, specifically that metadata must not be used to identify journalists and their sources.

- If the Committee does not adopt Recommendation 2(b), we recommend:

2(c) – A warrant must be required if an agency is seeking access to the metadata of journalists and journalists' sources.

ISSUE 3 – ROBUST UNIFORM PROCESSES FOR AUTHORISATION ARE REQUIRED TO ACCESS METADATA, AND MUST BE STIPULATED IN THE LEGISLATION

We are concerned that the authorisation that is currently required to access metadata[1] is not adequate for scale and scope of data being considered (but not yet finalised), and requires increased rigour.

RECOMMENDATION 3 – ROBUST UNIFORM PROCESSES FOR AUTHORISATION ARE REQUIRED TO ACCESS METADATA, AND MUST BE STIPULATED IN THE LEGISLATION

If the Committee does not adopt Recommendation 2(c) – whereby a warrant must be required for access to metadata of journalists and journalists' sources – we recommend the following at a minimum:

3(a) The person/s empowered with authorising requests for access to data; and disclosures of data must be limited to the most senior officials of an authorised agency.

Specifically, for the purposes of authorising access to metadata at Chapter 4 of the TIA Act, the definition of an *'authorised officer'* is too broad, and should be limited to the Commissioner of Police or the Deputy Commissioner of Police; or the head or deputy head of an enforcement agency. Similarly, the definition

[1] Chapter 4 of the *Telecommunications (Interception and Access) Act 1979* (the TIA Act)

of an *'eligible person'* should be limited to the Director-General of Security or the Deputy Director-General of Security. It may be practical to include an additional tier for both categories of authority, that being a Senior Executive Officer (SES) 3.

Additionally:

3(b) The subjectivity of authorisations be reduced by removing the phrase *'…he or she is satisfied…'*

For example, section 174(3) of the TIA Act currently states: *The eligible person must not make the authorisation unless he or she is satisfied that the disclosure would be in connection with the performance by the Organisation of its functions.*

Amending the provision in the manner recommended above, would result in the onus being more objective, as it would state: *The eligible person must not make the authorisation unless that disclosure would be in connection with the performance by the Organisation of its functions.*

We urge the Committee to consider these recommended amendments before proceeding with the Bill.

Annexure D

Submission to the Review of the *Freedom of Information Act 1982* and the *Australian Information Commissioner Act 2010*

19 December 2012

EXECUTIVE SUMMARY

The parties to this submission are: AAP, ASTRA, Commercial Radio Australia, Fairfax Media, Free TV Australia, MEAA, News Limited, Sky News and WAN (the parties).

The FOI system currently has two primary weaknesses:

- The government provides too few resources to meet public demand for information and review of decisions; and
- The protection of Cabinet documents and agency exemptions – preventing many documents from being accessed and made public.

Watering down FOI

The parties to the submission are disappointed that the terms of reference contemplate watering down the Australian public's right to know by proposing the reformulation of exemptions to the FOI Act.

The parties to this submission vehemently oppose any consideration of the argument that the provision of "frank and fearless advice" is threatened by the existence of FOI. The parties propose that "frank and fearless advice" is exactly the information that should be available to the Australian public. The parties also oppose any extension to the existing Cabinet exemption.

Under-resourced FOI system cannot continue

Under the reformed FOI Act and the AIC Act journalists continuously encounter barriers to accessing information including systemic delays in processing, failures of agencies to assist with applications and poor decision making.

The parties to the submission urge the Government to adequately resource the management of FOI requests and reviews of decisions – within existing budgets.

Current review processes – timelines and alternative avenues required

Further, the Office of the Australian Information Commissioner is failing its core purpose of providing an independent merits review mechanism.

The parties to the submission hold that timeframes and timelines must be introduced into the review and appeals process.

The parties also recommend that applicants be allowed to access alternative means of review at an early stage, including to the Administrative Appeals Tribunal.

1. INTRODUCTION

Timely access to government information about policies and programs, administration and management is a fundamental right and crucial to allowing voters to be informed in a democracy. Any attempt to diminish this right is unacceptable.

On 24 March 2009 the then Special Minister of State, Senator John Faulkner, in a speech to the Australia's Right to Know (ARTK) Freedom of Speech conference said:

> *"Democracy has at its heart a tension between ideas of responsible government and the disincentives for members of a government – who live and die by public opinion – to make unpopular decisions."*
>
> *"There is a growing acceptance that the right of the people to know whether a government's deeds match its words, to know what information the government holds about them, and to know the information that underlies debate and informs decision-making, is fundamental to democracy."*
>
> *"We still expect our parliament and our government to make decisions in the public interest, rather than their own political interests, but we no longer accept that the possibility of punishment at the polls for a necessary but unpopular decision gives a government the right to evade scrutiny."*

The Scope of the Review and the Terms of Reference

The Hawke review is required by s.93B of the *Freedom of Information Act 1982* (FOI Act) and s.33 of the *Australian Information Commissioner Act 2012* (AIC Act).

Senator Faulkner also noted in March 2009 that the then proposed reforms were not a final step because "new patterns of democratic engagement require new ways to inform debate and decision-making. Legislation, regulation, and policy must keep up, or they will end up strangling access rather than enabling it."

"In addition, the Government has given a commitment to again review the operation of the FOI Act after these reforms are bedded down," he said.

In the Terms of Reference published on 29 October 2012 the Attorney-General tasked Dr Hawke to:

> *"Review and report on the operation of the Freedom of Information Act 1982 (FOI Act) and the Australian Information Commissioner Act 2010 and the extent to which those acts and related laws continue to provide an effective framework for access to Government information."*

Those Terms of Reference need to be approached with some caution, because those Acts and related laws do not, and never have, provided any framework for access to Government information. The FOI Act has always expressly provided for Ministers and agencies to have the power to publish or give access to information or documents apart from under that Act (see now s.3A(1); and before the 2010 amendments s.14).

The AIC Act does confer upon the Information Commissioner personally the function of reporting to the Minister on any matter that relates to the Commonwealth Government's policy and

practice with respect to the collection, use, disclosure, management, administration or storage of, or accessibility to, information held by the Government and on the systems used or proposed to be used for such collection, use, disclosure, management, administration, storage or accessibility (AIC Act s.7).

The review will be careful to distinguish between the restricted purposes of the FOI Act and the broader policy advisory role of the Information Commissioner.

The objects of the FOI Act are prescribed in s.3 of that Act and they are:

1. To give the Australian community access to information held by the Government of the Commonwealth via:

   (a) requiring agencies to publish the information; and

   (b) providing for a right of access to documents.

2. The Parliament intends, by those objects, to promote Australia's representative democracy by contributing towards the following:

   (a) increasing public participation in Government processes, with a view to promoting better informed decision making; and

   (b) increasing scrutiny, discussion, comment and review of the Government's activities.

3. The Parliament also intends, by these objects, to increase recognition that information held by the Government is to be managed for public purposes, and is a national resource.

Importantly the review is established pursuant to s.93B of the FOI Act.

The reviewer should exercise his functions in accordance with s.3(4) of that Act so that as far as possible, he facilitates and promotes public access to information, promptly and at the lowest reasonable cost.

The parties are concerned that terms of reference include issues that have the potential to diminish the scope and effectiveness of aspects the FOI Act. In particular:

- the requirement to ensure the legitimate protection of sensitive government documents including Cabinet documents;
- the necessity for the government to continue to obtain frank and fearless advice from agencies and from third parties who deal with government;
- the appropriateness of the range of agencies covered, either in part or in whole, by the FOI Act; and
- the desirability of minimising the regulatory and administrative burden, including costs, on government agencies.

The Hawke review should not recommend any changes that would diminish the right of Australians to obtain timely access to government information through the FOI Act. The Hawke review must aim to improve the FOI Act and further its objects by contributing to increased public participation in government processes, with a view to promoting better-informed decision-making, increasing scrutiny, discussion, comment and review of the government's activities.

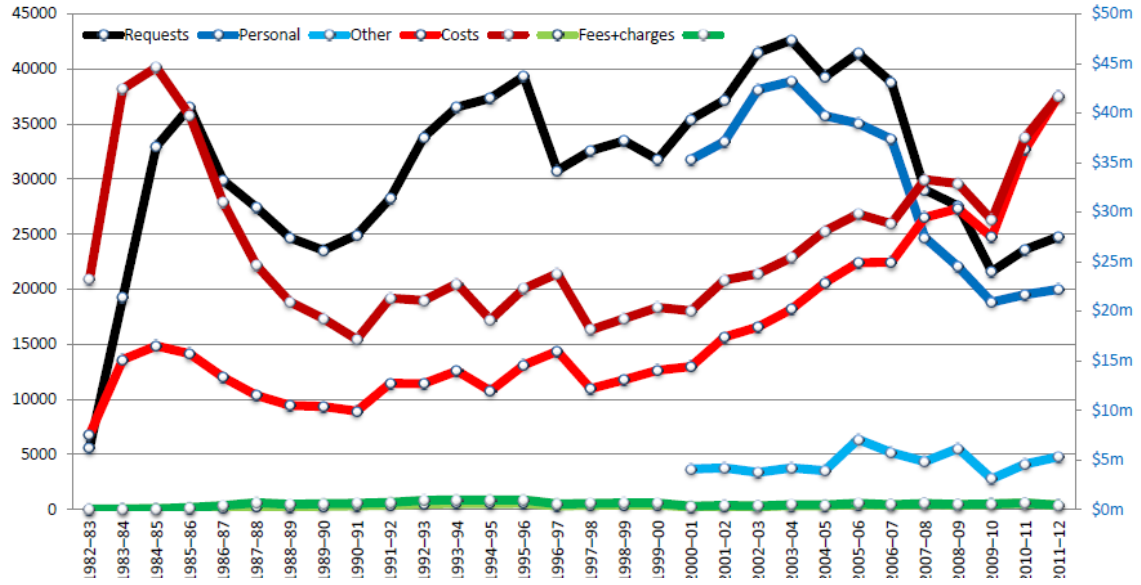
2. THE OPERATION AND EFFECTIVENESS OF THE FOI ACT

The reformed FOI Act improved the process of applying for documents held by the government. Key improvements include electronic lodgement and the removal of an application fee.

However, journalists still face a number of barriers to gaining access, including systemic delays in processing, sometimes exorbitant charges, failures of agencies to assist with applications and inappropriate exemption claims. There is also evidence of a clear decline in the proportion of requests granted in full or part and significant delays with a substantial minority of non-personal requests. Another noted failure is the merits review process administered by the Office of the Australian Information Commissioner (OAIC).

THE OPERATION AND EFFECTIVENESS OF THE OAIC

The OAIC costs $14.6 million per year.[1] That additional administrative cost accounts for about the whole of the increase in costs experienced with changes to the FOI Act as shown in the following table.[2]



While some of the resources allocated to the OAIC would have been allocated in any event for privacy compliance functions, the question arises whether the increase in costs for administration of the FOI Act, through the allocation of additional resources to the OAIC for that function delivers value for money.

Issues with OAIC

The Freedom of Information Commissioner Dr James Popple stated in the OAIC Annual Report 2011-12; *"…the reforms have been successful…It is easier, and cheaper, to access documents and government information than it was before the reforms."*[3]

[1] Office of the Australian Information Commissioner *Annual Report 2011-12*, Appendix 1
[2] Source – Information Commission Presentation to ICON Network
[3] Office of the Australian Information Commissioner *Annual Report 2011-12*, pp xii

However, the evidence relating to processing times and the quality of the information released does not support such claims. Further, the management of timely and effective reviews undertaken by the OAIC is sub-optimal.

In fact, it is becoming ever clearer that there is inadequate and ineffective resourcing to properly manage FOI requests and reviews of decisions. The parties to this submission urge the Government to cause agencies including the OAIC to address this matter expeditiously.

Poor processing times and quality of the information released

The Office of the Australian Information Commissioner's 2011-12 annual report shows that in each of the last four reporting years there has been a decrease in the proportion of FOI requests granted in full or in part:

- 93.9 per cent were granted in full or in part in 2008-09
- 92.5 per cent in 2009-10; and
- 88.4 per cent in 2011-12.

Over the same period, requests yielding full release have fallen from 71 per cent in 2008-09 to 59.1 per cent 2011-12.[4] While the proportion of personal requests granted in full remained constant over the years spanning commencement of the FOI reforms the proportion of non-personal requests granted in full fell from 31.6% to 28.4% with the proportion refused rising from 25.9% to 26.9%.[5]

The same report shows significant delays with non-personal related FOI requests. Of 3507 non-personal requests in 2011-12:

- 2660 were completed within the statutory time frame;
- 394 requests were delayed by up to 30 days over the statutory limit;
- 192 requests were delayed by 30 to 60 days;
- 156 requests were delayed by 61 to 90 days; and
- 105 requests delayed by more than 90 days.

The OAIC itself notes that agencies' delay in processing FOI applications was the issue most frequently raised by complainants, and states that:

> *"some agencies have made decisions or dealt with FOI applicants in ways that are at odds with the pro-disclosure culture that the FOI Act promotes and requires."*[6]

Poor performance of review processes and outcomes

The availability of a robust and timely merits review mechanism is fundamental to secure the right of access compared conferred by the FOI Act. That is currently a role of the OAIC. By the OAIC's own standards it is failing in this core area.

Non-personal material held by agencies is often the most valuable for informing the public of the government's performance. However, those matters are often those that are subject to the greatest level of delay.

[4] Ibid, pp 120
[5] Ibid, pp 120
[6] Ibid, pp 124

As the 2011-12 annual report notes:

> *"One of the OAIC's deliverables is to finalise 80% of all IC review applications within six months of receipt. In 2011-12, only 32.8% were finalised within six months* [emphasis added].[7]
>
> *"Since early in its operation, the OAIC has had a backlog of IC reviews on hand: that is, not finalised. On 30 June 2012, the OAIC had 357 IC reviews on hand: 56% of the total number of IC reviews received since November 2010."*[8]

Indeed, the failure in the review process is such that a report in *The Age* newspaper published on April 9, 2012 stated:

> *"The OAIC expects to receive as many as 700 FOI review applications in 211-12. In February [2012], the office had a backlog of more than 340 applications and this is expected to grow. Applicants for FOI reviews can expect a six-week wait before any response and a delay of six months or longer before the matter is progressed.*
>
> *"Departmental FOI officers have candidly acknowledged that the OAIC's growing backlog allows 'sensitive' FOI requests to be 'put on the back burner.'"*[9]

Such outcomes can be interpreted as enabling Government to keep important information under wraps. The parties believe that it is undesirable, and detrimental to all Australians that delays and backlogs could conceivably be used to justify sensitive FOIs being left unaddressed (at worst) or delayed (at best).

Recommendation – appropriate resourcing within existing budgets

The parties to the submission call on the Government to appropriately and adequately resource the management of FOI requests and reviews of decisions – within existing budgets and ensure that agencies, including the OAIC devote sufficient resources to the review of FOI decisions.

The delays in processing caused by under-resourcing are real issues for all people seeking access to information – including media organisations. It is disappointing and also concerning that the outcomes that are experienced have a chilling effect on the right of the Australian – and international – public to know.

[7] Ibid, pp 96
[8] Op. cit.
[9] Phillip Dorling "Reform on FOI bogs down" *The Age* 9 April 2012: http://www.theage.com.au/opinion/political-news/reform-on-foi-bogs-down-20120408-1wjof.html

3. THE OPERATION AND EFFECTIVENESS OF THE TWO-TIER REVIEW SYSTEM

In addition to these issues regarding the timeliness of OAIC decisions, the parties to this submission are also concerned about the quality of decision making by the OAIC in relation to reviews.

Lack of time limits associated with review

In March 2012 Seven Network (a party to this submission) reviewed 17 published decisions taken by the OAIC since January 2011. Only one of the 17 decisions took less than 100 days. Eighty-two per cent of the decisions took longer than 20 weeks, meaning applicants were left waiting for more than five months in nearly all cases. Seven decisions took more than 200 days to be delivered and two took more than one year.

By way of further example, it took 393 days to decide whether a diary entry relating to political party function was an official document of a Minister; and it took 275 days to determine whether a letter to the Prime Minister from a political organisation is an official document of a Minister. These decisions, which only turn on whether s.4(1) of the FOI Act applies, should have been made more quickly and reflects poorly on the performance, capability and capacity of the OAIC. More recently, it took the Commissioner 11 months to decide that two letters to the Prime Minister from a former Prime Minister concerning current matters of political debate were not exempt by reason of their containing personal details (name and address) of the former Prime Minister. That decision turned on a very narrow question of fact – and while the former Prime Minister may have been entitled to be consulted, an appropriate decision making process could have accommodated that with very little delay.

It is relevant to note that more than two in three decisions made by the OAIC that were reviewed by the Seven Network affirm the original ministerial or agency decision (meaning in those cases, the applicant's appeal was unsuccessful). Only five of the 17 decisions were set aside and substituted with a different decision. Significantly, only one decision was wholly in the original applicant's favour.

In a speech to the Australian Corporate Lawyers Association on 12 August 2012, barrister Tom Brennan stated the Information Commissioner and the Freedom of Information Commissioner met regularly with government officials in a forum known as "ICON" (Information Contact Officers Network), and that that network is constituted by officials of agencies responsible for FOI administration.

Mr Brennan noted that material provided by the Freedom of Information Commissioner to the ICON network meetings indicates that the backlog has continued to grow:

> *"By 16 March 2012 the office had received 504 applications for review of which 162 had been finalised. Of the 162 finalised reviews, some 140 were finalised by the applicant withdrawing or by the exercise of summary dismissal powers by the Commissioner. Only 3 matters had been resolved by agreement between the applicant and the agency concerned or by the variation of decision and 19 matters had been resolved on the merits."*
>
> *"In the six weeks following, until 31 May 2012 a further 100 applications were received. In that period 76 applications were finalised, of which 69 were dealt with through*

withdrawal or summary dismissal and 7 were resolved on the merits. None were resolved by agreement or variation of decision."

Mr Brennan raises a significant issue in relation to the review process – the high incidence of reviews dismissed or withdrawn:

> *"In total between 1 November 2010 and 31 May 2012 some 604 applications for review had been received. Of those, 209 have been dealt with through withdrawal or summary dismissal. That is a very high number and large proportion. Three matters were resolved by agreement or variation of the decision and 26 had been resolved on the merits. They are both low numbers and very low proportions. The backlog of unresolved review applications had grown to some 366. That is a very high number and constitutes 60% of applications received."*

Consideration of some of the data published in the Commissioner's Annual Report indicates that major adjustments were made to the review process towards the end of the financial year.

For example at Table 8.3 on page 95 the Commissioner reports that in the year to 30 June 2012 some 78 applications for review were dismissed pursuant to s.54W of the Act, including 22 pursuant to s.54W(b) by which, in effect, the Commissioner refers applications for review to the AAT.

Yet at 31 May 2012 the total of all reviews which had been closed since November 2012 at the discretion of the Information Commissioner pursuant to any provision of s.54W was 57, and by 31 May 2012 there was no mention in any publication by the Information Commissioner of any decision having been made by him pursuant to s.54W(b) resulting in referral of applications for review to the AAT.

There seems no doubt that the rate of discretionary rejection of applications for review pursuant to s.54W rose substantially in June 2012 – no fewer than 21 were rejected for that reason that month. Further it may be that all 22 of the applications for review which were referred by the Commissioner to the AAT were referred in June 2012. The changes in review process merit close review.

Lack of time limits means no access to AAT until completion of review

The parties are also concerned about the high level of review applications being withdrawn or dismissed and the fact that the merits review role has been conferred without the imposition of any time limits for its exercise. As a consequence, an applicant usually has no access to the Administrative Appeals Tribunal (AAT) until after the Information Commissioner has completed the review exercise. There is serious concern that there no formal constraint on the OAIC to act promptly.

Further the significant number of reviews which have been refused by the Commissioner pursuant to s.54W(b) and thereby referred to the AAT calls into question the rationale for the prohibition on applicants approaching the AAT prior to the exercise of such a discretion by the Commissioner. There is no information publicly available to explain the basis for the decisions to refer applications to the AAT.

Recommendation – implementation of timeframes for review

Timeframes must be introduced into the review and appeals process. It is clear that timeliness is crucial when reporting on the activities of government, particularly as an issue may lose its relevance or currency as a result of delays.

Lack of rigour and independence of review process

In the *Open Government Report: a Review of the Federal Freedom of Information Act 1982*[10] the ALRC commented upon the inconsistency of the role of conduct of determinative merits review on the one hand and the other FOI functions to be conferred on an Information Commissioner on the other.

The freedom of information functions conferred upon the OAIC by the *Australian Information Commissioner Act 2010* s.8 include:

(a) promoting awareness and understanding of the FOI Act and the objects of the Act;

(b) assisting agencies to publish information in accordance with the Information Publication Scheme;

(c) providing information, advice, assistance and training to agencies and others on the operation of the FOI Act;

(d) issuing guidelines to be taken into account by decision-makers under the FOI Act;

(e) proposing to the Minister legislative changes to the FOI Act;

(f) proposing to the Minister administrative action necessary or desirable in relation to the operation of the FOI Act;

(g) monitoring, investigating, reporting on compliance by agencies with the FOI Act;

(h) collecting information statistics from agencies and Ministers about the FOI Act.

In addition to those functions the Commissioner is responsible for the conduct of merits reviews under Part VII of the FOI Act.

There is a fundamental and necessary incompatibility between the function of performance of external merits reviews on the one hand and the other functions conferred upon the Commissioner on the other.

At least in some cases, and in particular in contentious cases in which the media are likely to be involved, the external merits review function cannot be effectively discharged without the reviewer being, and being seen to be, independent of the agency or Minister whose decision is subject to review.

[10] http://www.alrc.gov.au/report-77

However the effective discharge of the Commissioner's other functions make it impossible for him to be seen to be independent of Government agencies.

For example the Commissioner has established a series of workshops with Information Contact Officers of departments and agencies under the acronym ICON. We do not doubt that that is an important and effective forum through which the Commissioner can discharge his functions of promoting awareness and understanding of the FOI Act, and assisting agencies on various aspects of operation and administration of the FOI Act. However it is impossible for the Commissioner to hold those regular meetings with respondent agencies and their representatives and to then be accepted as an independent umpire by applicants who seek to question decisions made by those respondent agents, hopefully under the influence of the Commissioner's guidance provided at those ICON meetings.

Similarly, the Commissioner has issued guidelines for decision makers. In discharge of his merits review function the Commissioner is required to consider whether or not to apply those guidelines in an individual case. In being required to do so he is required to make invidious choices – particularly where the statute operates to require the Commissioners themselves to personally make decisions and to issue guidelines.

Many of the Commissioner's merits review decisions have been on the assessment and waiver of charges. He has separately reviewed FOI charging and published his recommendations. Applicants seeking review of charging decisions under current law are left in the invidious position of seeking that outcome from a reviewer who has published his views that the legislation should be changed to restrict the right applicants are seeking to exercise.

Each of the above examples is an example of structural incompatibility of the OAIC's main stream role with its merits review role.

This circumstance is exacerbated by the OAIC's laudable commitment to alternative dispute resolution mechanisms, including conciliation and mediation. While those mechanisms may well be effective in many cases, the absence of any framework to clearly delineate between the alternative and informal dispute resolution mechanisms first employed, and formal merits review exacerbates the difficulties of providing an external merits review function which is capable of being seen by applicants to be independent. That is, parties dealing with the OAIC in an alternative dispute resolution process have no way of being assured that information provided or admissions made will not be taken into account in making any decision on a formal merits review.

There would be no incompatibility between the broader freedom of information functions of the OAIC and it retaining an alternative dispute resolution function – in which reviews would be resolved one way or another by agreement.

However consideration must be given to either removing the formal merits review function from the Commissioner, or providing to applicants the option of applying to the AAT for review, without requiring any decision by the Information Commissioner.

The fact that in the last financial year some 22 decisions were in effect referred by the Commissioner to the AAT would indicate that the Commissioner himself sees no difficulty arising from any such "bifurcated" review process. This review could usefully analyse the details of those 22 cases and assess the effect of the referrals to the AAT.

Attachment A provides relevant documentation regarding an application for review by Seven Network to the OAIC against the Commonwealth Department of Immigration in relation to current and future overcrowding in detention centres – issues upon which the Reviewer will be well informed from his own review of those matters. They are matters of manifest public interest. The OAIC was unable to complete the review in a timely manner and has revealed poor process and a failure to address bias. The decision making process adopted by the Commissioner might, or might not, ultimately prove to be effective and legally accurate. However it cannot result in the applicant (or affected third party) being satisfied that any review has in fact been conducted independently and in accordance with the facts. Not only has there been extensive delay in the handling of the application for review, the Information Commissioner in his letter of 28 November 2012 in effect concedes that advice to the review applicant from the OAIC, in giving reasons refusing to provide to the review applicant documents which had been provided to the Information Commissioner for the purposes of the conduct of the review, were inaccurate.

In his letter of 28 November 2012 the Commissioner advised that he had prepared a non-binding case appraisal that was being sent to the respondent agency and the affected third party. He noted it would be open to those parties to make further detailed submissions to him in response to that non-binding case appraisal but that the appraisal would not be provided to the applicant. It seems unlikely that any further submissions by the respondent or affected third party could be provided to the applicant.

The consequence is that the decision-making process will in effect be, as the Commisioner would have had it throughout, a dialogue between the Commissioner, the respondent and the affected third party. The applicant will not participate. The applicant cannot be provided with any adequate assurance that any decision has been made in accordance with the law and based on the facts.

Recommendation – access to alternative means of review, including the AAT, at an early stage

To address the issues outlined above the parties to this submission recommend that applicants be allowed to access alternative means of review at an early stage, including the AAT.

Under the *Government Information (Public Access) Act 2009* (NSW), a number of review rights exist. An applicant may seek an internal appeal, approach the Office of the Information Commissioner (NSW OIC) for a review of the agency's decision or they may go to the Administrative Decisions Tribunal to request a review.

In the Open Government Report, the ALRC considered whether the Information Commissioner should have a merits review role. It stated that it was:

> *"not usual for an institution responsible for formulating guidelines on the administration of legislation to have individual case dispute resolution powers. Providing advice and assistance to both parties and, perhaps, facilitating a request could give rise to a conflict*

of interest and a perception of a lack of independence if the FOI Commissioner were to have determinative powers."[11]

While, such conflict of interest may not exist in this case, the provision of an appeal process direct to the AAT from a refusal or deemed refusal of an agency would alleviate pressure on the OAIC and provide an alternative mechanism for applicants interested in accessing an independent tribunal with extensive experience with FOI matters. It is only through such a mechanism that the perceptions of lack of independence can be addressed in circumstances where those perceptions are necessary attributes of the OAIC's other functions, and of the OAIC's implementation of Alternative Dispute Resolution mechanisms.

Therefore the parties to this submission recommend amendment of the FOI Act to provide a direct right to apply to the AAT for applicants at the deemed refusal stage or from an internal review.

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11 Australian Law Reform Commission *Open Government - A Review of the Federal Freedom of Information Act 1982*, 1996, paragraph 6.20: http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC77.pdf

4. THE REFORMULATION OF THE EXEMPTIONS IN THE FOI ACT

In its June 1, 2009 response to the draft *Information Commissioner Bill 2009* and the draft *Freedom of Information Amendment (Reform) Bill 2009*, ARTK addressed the issue of key exemptions. The parties to this submission maintain that and any reform to further extend of the Cabinet exemption or to protect the concept of frank and fearless advice are vigorously opposed.

Similarly, any attempt to limit access to so-called sensitive documents is also rejected. Existing exemptions amply protect the public interest and changes to increase a government's ability to prevent documents from release will only contribute to secrecy – perception and/or reality – and ultimately damage Australia's democracy.

The parties to the submission do not support the extension of exemptions in the FOI Act, including the application of the new public interest test taking account of sensitive government documents including Cabinet documents; and frank and fearless advice.

Public Interest Test

The parties believe the new public interest test has contributed to the efficiency of operation of the FOI Act. However, the test does not apply to several exemptions in the Act, including cabinet documents and documents relating to national security, defence and international relations.

The parties believe that the single public interest test should be applied consistently across all exemption categories, furthering the objects of the FOl Act.

There is no evidence that applying a public interest test to all categories of exemption will have a detrimental impact on the Government's decision making processes. It is unlikely that Australian decision makers, including courts, may conclude that it would be in the public interest that documents be released if it could cause the harm of compromising collective ministerial accountability or endanger national security.

The parties believe that the FOI law needs to provide for the extraordinary. Government failings of indisputable national and significant consequence can occur and should not be protected by the sanctity of Cabinet. The Australian Wheat Board bribery scandal, information relevant to weapons of mass destruction and Australia's decision to go to a non-UN sanctioned war in Iraq, the troubled home insulation scheme are examples where there is a legitimate public interest in release of information.

In such situations, decision makers should be required to consider where the public interest lies and consider whether or not to decide to release the documents. Of note, the New Zealand Official Information Act allows greater access to Cabinet information without any discernible problems in administration or management.

Reformulation of exemptions

The parties to the submission do not support the reformulation of exemptions in the FOI Act.

Sensitive government documents, including Cabinet documents, are no exemption

ARTK supported the amendments in the FOI Bill to clarify the scope of the Cabinet exemption on the basis the exemption only captures documents prepared for the dominant purpose of submission to the Cabinet.

The parties to this submission maintain that the Cabinet exemption should not extend to extracts of factual or statistical material contained in Cabinet documents. This material does not reveal the deliberations of Cabinet. This material does, however, play a vital role in informing the public about the quality of Cabinet decision making.

The provision of frank and fearless advice is no exemption

The terms of reference of the review refer to the necessity for the government to continue to obtain frank and fearless advice from agencies and from third parties who deal with government.

The reference to third parties who deal with government causes us great concern. There is no basis to think that there exists any "third party" which in fact deals with government on a "frank and fearless" basis – and there are good and substantial reasons to think that public administration would generally be enhanced by commercial parties dealing with government continuing to experience the pressure to be accurate (including the pressure that comes from the risk of disclosure of their communications with government).

Notably, third parties are not subject to the *Public Service Act* and its duties and mechanisms to enforce obligations of accuracy.

"Frank and fearless advice" from public servants is exactly the information that should be available to the Australian public. Logically, if frank and fearless advice supports the quality of Government programs and policies, then Government would be happy for such information to be released. If such advice does not support a government policy or program, and/or identifies flaws or problems, then the public will be better informed – despite any negative political consequences for the Government.

Broader community knowledge of the failures or flaws of a government policy or program can lead to pressure to reform or discontinue the policy or program, ensuring funds are spent in the national interest, not the political interest of politicians. This is precisely the reason why 'frank and fearless advice' is the correct manner in which advisers to Government should act, and what should be available to the Australian public.

In its I June 2009 response to the draft *Information Commissioner Bill 2009* and the draft *Freedom of Information Amendment (Reform) Bill 2009,* ARTK noted its consistent arguments that the public interest factors first identified in *Re Howard*[12], including the issue of frank and fearless advice, lacked any evidentiary basis and have been blight on effective FOI. ARTK supported the decision to make at least some of those factors irrelevant in determining the public interest test.

However, ARTK argued the then FOI Bill should be amended to specify that the discouraging of full and frank advice is an irrelevant public interest factor.

The flaws in arguing against disclosure in those circumstances were identified in the AAT's judgment in *McKinnon v Dept PM & Cabinet* V2005/1033[13]. In that case, Deputy President Forgie rejected claims that public servants have a reasonable expectation the documents they prepared

[12] *Re Howard and the Treasurer of the Commonwealth* (1985) 7 ALD 645
[13] [2007] AATA 1969

would remain confidential. The case also showed that failing to provide frank and fearless advice directly contradicted obligations under the Public Service Act.

5. THE APPROPRIATENESS OF THE RANGE OF AGENCIES COVERED BY THE FOI ACT

The parties to this submission believe that as a general principle, all agencies should be covered by the FOI Act except agencies inexorably linked to national security such as ASIO or ASIS – although the administrative functions of such agencies should be in scope.

The Parliament and the Governor General should be covered by the FOI Act because tax payers are entitled to know how public funds are being spent and because their functioning as institutions is at the heart of the operation of Australia's representative democracy. The exclusion of parliamentary departments was criticised by the Australian Law Reform Commission (ALRC) which recommended their inclusion in 1996.

Internationally, England, Scotland, India, Ireland, South Africa and Mexico all allow FOI requests to parliamentary departments. Domestically, Tasmania's *Right to Information Act 2009* allows requests to parliamentary departments, although this is limited to administrative matters.

Further, the failure to allow FOI access to Parliament cannot be justified given the importance of Parliament to Australia's democracy and international best practice.

6. THE ROLE OF FEES AND CHARGES ON FOI

The veracity of the right to access information must be upheld

The report of the *Review of charges under the Freedom of Information Act 1982* (Charges Report) notes:

> *"FOI charges can discourage or inhibit the public from exercising the legally enforceable right of access to government information granted by the FOI Act. The objective of the Act to make government open and engaged with the public will be hampered if it is too expensive or cumbersome for people to make FOI requests*".[14]

The Charges Report goes on to refer to the *"problem of large and complex applications from specific categories of applicants who use the FOI Act rather than rely upon other means to obtain information (such as law firms that use the FOI Act as a form of discovery, and members of parliament, journalists, researchers and the media)".*[15]

This comment displays a troubling misunderstanding of the importance of a legal right to information for everyone, regardless of profession or purpose.

The parties to this submission are committed to an FOI Act which provides a formal, legal right of access to government information at the lowest cost. Such a right cannot be subordinate and supplementary to the informal provision of information by agencies, which can selectively release information to an applicant. The FOI Act exists because an independently reviewable, legal right of access is required to ensure access to government information – and this should be upheld at all times, to the highest standards.

[14] Prof. John McMillan *Review of charges under the Freedom of Information Act 1982* February 2012, pp 1
[15] McMillan, op. cit, pp 5

Administrative release no substitute for FOI

The Charges Report states that *"agencies are encouraged to establish administrative access schemes that enable people to request access to information or documents that are open to release under the FOI Act. A scheme should be set out on an agency's website and explain that information will be provided free of charge (except for reasonable reproduction and postage costs."*[16] However the availability of administrative access schemes cannot replace or diminish the FOI process.

When coupled with the right to access information at the lowest cost, the parties therefore reject the proposal in the Charges Report that agencies impose a $50 application fee if a person makes an FOI request without first applying under an administrative access scheme that has been notified on an agency's website.

This proposal diminishes the fundamental right to information and also penalises a citizen for exercising that right. Administrative access may be offered as an alternative to access through FOI but it cannot be used to replace the right to government information. Various States have well established systems whereby agencies, with the agreement of applicants, will initially deal with a request as if it were for administrative access and only move to the more formal and expensive FOI processes if the applicant is dissatisfied with the outcome. We have no difficulty with approaches such as that – but they operate by agreement, and not by curtailing a right otherwise enjoyed by the applicant.

Further, the assertion that administrative release can be an effective process for obtaining access to information has been found to be wrong by a research project conducted by Seven Network in September this year. (See Attachment B)

In October 2012, Seven Network sought information through fifteen administrative requests made to ten government departments in the period 5 September to 29 September 2012. Information contained in this document refers to phone and email conversations between a Seven News journalist and government department representatives.

The departments approached were:

- Education Employment and Workplace Relations (regarding two consultancies);
- Finance and Deregulation, the Department of Defence (regarding three consultancies);
- Attorney-General's;
- Treasury (regarding three consultancies);
- Infrastructure and Transport;
- Industry Innovation Science Research and Tertiary Education;
- the Australian Public Service Commission;
- Sustainability Environment Water Population and Communities; and
- Families Housing Community Services and Indigenous Affairs.

Of the reports requested, three were unable to be released as they were not yet complete, one was apparently "confidential" and two reports were claimed to be an "internal evaluation". Two requests were responded to with details of how to find information regarding the reports online, and one report and subsequent consultancy was cancelled. Of the total requests, six were replied to with varying responses regarding how to go about making a FOI request to gain access to the requested information.

[16] Ibid., pp6

During the course of at least five phone conversations, the journalist requesting information was asked "what administrative release was" and was obliged to direct public servants to the website for the OAIC for further information.

This research establishes that there exists neither the culture nor the systems to ground any confidence that administrative access schemes can be made to operate as an alternative to the right to access under the FOI Act. In truth, at this time they may be not much more than a dream, a hope or a gleam in the Information Commissioner's eye. While we have no doubt that the Commonwealth could learn a great deal from the States (and the OAIC could develop a better approach to administrative access by close study of State practice), the case for linking administrative access schemes with FOI charging has not been made out and should not be pursued.

Processing charges

The Charges Report also recommends that no FOI processing charge should be payable for the first five hours of processing time (which includes search, retrieval, decision making, redaction and electronic processing). The charge for processing time that exceeds five hours but is less than 10 hours should be a flat rate of $50. The charge for each hour of processing after the first 10 hours should be $30 per hour.[17]

Such a proposed charging mechanism – particularly the proposed payments beyond the first 10 hours – is a disincentive to seeking information. Such charges confirm the statement made in the Charges Report that *"FOI charges can discourage or inhibit the public from exercising the legally enforceable right of access to government information granted by the FOI Act."*

Such charging proposals undermine the objective of the Act – that is, to make government open and engaged with the public. The parties believe that such a proposal should not proceed.

Same day disclosure processes

Another issue impacting the parties to this submission is the use of same day disclosure processes by government, to diminish investment by media in FOI. A previous ARTK submission was made to Government regarding this issue. A copy of that submission is at Attachment C.

OAIC guidelines – Part 14 Disclosure Log – are available on this matter.[18] However, the parties note that some agencies are ignoring or failing to adhere to the guidelines, and/or using outdated versions of the guidelines.

The parties to the submission recommend review of this particular matter.

Processing time

The Charges Report also recommends a ceiling on processing time of no more than 40 hours replacing the practical refusal mechanism in ss 24, 24AA and 24AB. This is rejected by the parties to the submission.

[17] Ibid, pp6-7
[18] http://www.oaic.gov.au/publications/guidelines/part14-disclosure-log.html

The FOI Act uses the term "unreasonably" relevant to whether a request diverts resources or interferes with functions, and this term allows judgement on the basis of the public interest of the information sought. The parties contend that this term must remain; and in any event there must be external merits review of any decision to refuse a request because of processing demands.

Any suggestion that an agency can set a 40 hour limit by a non-reviewable decision will seriously diminish the effectiveness of the FOI Act. In fact we have grave concerns that such a provision would be available to agencies to defeat almost every contentious, public interest focussed FOI request. Even in cases where only specified and readily located documents were requested, how would an applicant effectively question a (non reviewable) decision to refuse access because the agency has estimated that reading the specific documents for the purpose of making exemption decisions will take more than 40 hours? Similarly, in the case of single, large documents the provision would operate to make the documents in effect exempt simply because of their size – because reading them would take longer than the 40 hours.

Other charges issues

The parties support the reform allowing an applicant to apply for reduction or waiver of an FOI charge on the basis of financial hardship.

The recommendation in the Charges Report that an applicant pay $100 if applying directly for Information Commissioner review (when internal review is available) is onerous and denies a right of timely appeal. Such a proposal is not supported.

Payment options – electronic funds transfer must be available in all instances

There are various processes and payment options – including limitations – across agencies. The parties to this submission urge the government to ensure that electronic payment is available, and accepted, in all instances for the payment of FOI fees and charges.

Annexure E

19 December 2012

Attn: Mr Stephen Bray
Senior Policy Officer, Justice Policy
Department of Justice
10 Spring St
SYDNEY NSW 2000
By email: Stephen_bray@agd.nsw.gov.au

Dear Mr Bray,

We write to provide a submission to the NSW Attorney General for the review of the of the *Government Information (Public Access) Act 2009* (the GIPA Act).

The media organisations that are parties to this submission are AAP, ASTRA, Bauer Media, Commercial Radio Australia, Fairfax Media, Free TV, MEAA, News Corp Australia, The Newspaper Works and West Australian Newspapers (the Media Organisations).

We welcome to the opportunity to provide a submission to the review of the GIPA Act and accept the NSW Government's invitation to engage in further consultation in the first quarter of 2015 following initial analysis of submissions and identification of the key issues.

As the Attorney General is aware, the media plays a crucial role in a democracy in accessing, analysing and disseminating information about issues and events which affect our community. Media organisations and journalists have a particular concern in the proper and efficient administration of the information access laws. Open and transparent government is critical to democracy and should not be constrained for the protection of political interests. This year's revelations in NSW underpin the importance of an effective GIPA regime.

This submission raises a number of issues important to improving the GIPA Act and a more detailed submission will be provided at the next stage of consultation.

Costs and charges

Costs and charges remain one of the major constraints to the media's effective use of the GIPA Act.

The Solomon Report into Queensland's then FOI Act noted that the United States FOI model recognised the value of access information where no charges apply to information released in the public interest because it is *'likely to contribute significantly to public understanding of the operations or activities of the government.'* [1]

The 1990 Electoral and Administrative Review Commission (EARC) Report (Queensland) noted that *'access to information as to what decision are made by government and the content of those decisions, are fundamental democratic rights. As such, FOI is not a utility, such as electricity or water, which can be charged according to the amount used by individual citizens.'*

We recommend two proposed changes regarding fees and charges:

i. Similar to the Commonwealth FOI Act, all agencies should be required to accept applications

[1] http://www.rti.qld.gov.au/__data/assets/pdf_file/0019/107632/solomon-report.pdf, p195

online and there should be no application fee for requests lodged by media. In addition, applicants should have the option of the provision of decisions and documents by email. This reform has proven to be among the most significant and important in improving access to the Commonwealth Act since it was adopted, and should be part of the GIPA Act.

ii. Section 66 of the GIPA Act states: *'An applicant is entitled to a 50 per cent reduction in a processing charge imposed by an agency if the agency is satisfied that the information applied for is of special benefit to the public generally.'*

This section should be amended so an applicant can be entitled to a 100 per cent reduction in processing charges on the basis that release of the information is the public interest. The term *'special benefit'* has proven to be difficult to define and too high a hurdle. Any information released under GIPA is information that was not going to be released by government as a matter of course. Therefore information released under GIPA plays a valuable role in informing the public about government, and should be available at less cost to applicants.

Power of the Information Commissioner to conduct reviews

Another issue requiring reform relates to the power of the Information Commissioner to conduct reviews (Section 89).

We note that, for example, under Section 92 of the GIPA Act *'the Information Commissioner may make such recommendations to the agency about the decision as the Information Commissioner thinks appropriate.'* Similarly, Section 92 provides *'the Information Commissioner may recommend that the agency reconsider the decision that is the subject of the Information Commissioner's review and make a new decision as if the decision reviewed had not been made.'*

This power for the NSW Information Commissioner to recommend can be contrasted to the existing power of the Office of the Australia Information Commissioner under the Commonwealth FOI Act. Under Section 55K of the Commonwealth Act, the Information Commissioner *'must make a decision in writing: (a) affirming the IC reviewable decision; or (b) varying the IC reviewable decision; or (c) setting aside the IC reviewable decision making a decision in substitution for that decision.'*

We recommend that the NSW Information Commissioner be empowered to make decisions affirming, varying or setting aside reviewable decision as well as being able to make new decisions. The failure to provide this power leaves agencies with the ability to ignore recommendations of NSW Information Commissioner, which we do not think is appropriate. Independent umpires cannot have credibility when they can recommend a binding resolution.

Application of the Act

Any review of the GIPA Act must take into account revelations about politicians, donors and the political process. The NSW Independent Commission against Corruption has and continues to undertake a number of investigations involving events containing these elements. These events dictate that the extent of accountability, openness and transparency faced by the elected representatives of the NSW Parliament must be addressed by this review of the GIPA Act.

Issues like the application of the Act to the NSW Parliament and to electoral offices should be clarified and improved. Similarly, so-called 'party political' information, particularly involving donors

to a given party or politician, that can be exempted as unresponsive to a GIPA application on the basis that such information is not a government document, should be addressed.

This information should not be exempt from the GIPA Act. A strengthened GIPA Act in this area will ensure politicians perform their duty in the public interest.

The GIPA Act states, for example, under Schedule 1, Section 11, that *'it is conclusively presumed that there is an overriding public interest against disclosure of information the disclosure of which would disclose information contained in the Register of Interests kept by or on behalf of the Premier pursuant to the Code of Conduct for Ministers of the Crown adopted by Cabinet.'* Secrecy about the register of interests is unacceptable and, coupled with secrecy about the correspondence of ministers and other elected representatives about party political matters allows possible corruption. Indeed, any review should consider whether a public interest test should apply to Schedule 1, particularly when an application is supported by reasonable information of possible mismanagement or corruption.

Disclosure logs

Another issue requiring reform relates to Section 25 of the Act relating to disclosure logs. We contend that information provided to an applicant should not be available on the disclosure log for 10 working days upon request of the applicant. Same day release discourages journalists from pursuing information through the GIPA process as that information would readily be publicly available (subject to the request being granted). Also, same day release may hinder journalists in accurate and fair reporting as complex documents are required to be turned around quickly without necessary analysis and checks with external sources and experts. We are able to provide a far more detailed submission, prepared for the OAIC, on this issue if required.

As we outlined previously in this submission, we appreciate the opportunity to make this contribution to the initial stage of the GIPA Act review. We look forward to participating in more detailed discussions in the next phases.

Annexure F

Submission by Free TV Australia

Parliament of South Australia

Legislative Review Committee

Inquiry into Surveillance Devices

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[1].

[1] 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

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

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.

Annexure G

Submission by Free TV Australia

Australian Law Reform Commission

Serious Invasions of Privacy in the Digital Era – Discussion Paper

12 May 2014

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EXECUTIVE SUMMARY

- While the ALRC's terms of reference require it to consider what a cause of action for serious invasions of privacy should look like, rather than whether one should be introduced at all, Free TV submits that the second question is a critical threshold that has not been met, and accordingly, the discussion is somewhat artificial.
- On this important threshold issue, Free TV does not support either a statutory cause of action for serious invasions of privacy, or a new statutory tort of harassment, or any broadening of the ACMA's powers to deal with privacy matters, for the reasons identified below.
- Additional layers of privacy regulation are unnecessary as there is no identified gap in the existing privacy law framework. The current framework of legislative, common law and regulatory protections is extensive, effective in protecting individuals and is operating well.
- There is no demonstrated need for additional layers of privacy regulation to be introduced. The number of privacy complaints in respect of commercial free-to-air television broadcasters is very low and declining.
- Additional layers of privacy regulation would:
    - unnecessarily complicate privacy laws;
    - have a deterrent effect on news and journalism, and increase uncertainty;
    - potentially lead to a range of unintended consequences for individuals in an evolving technological and social context and have a stifling effect on innovation; and
    - place an unjustified regulatory burden on Free TV members, including by exposure to complex and costly litigation.
- Free TV welcomes the ALRC's proposal that legislation in relation to surveillance devices should be uniform across Australian States and Territories. Any such legislation should include a clear public interest exception which recognises the need for journalists to be able to use such devices as part of their role in providing important news and current affairs coverage.

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 respond to the ALRC's Discussion Paper 80, '*Serious Invasions of Privacy in the Digital Era*'.

While Free TV understands that the ALRC is not considering the question of whether or not a statutory cause of action should be introduced, Free TV considers that this is a critical threshold question that should be answered before embarking on any detailed analysis of such a statutory action.

Consistent with Free TV's submission to the Issues Paper, Free TV remains opposed to a statutory cause of action for privacy. The existing privacy law framework is extensive and already imposes a significant regulatory burden on broadcasters. There is no demonstrated gap in the existing framework, and no evidence of any problem that justifies the introduction of a statutory cause of action. Such a cause of action will place undue weight on privacy at the expense of other important rights and freedoms, including freedom of communication.

For the same reasons, Free TV also opposes a new statutory tort of harassment, broadening of the scope of breach of confidence remedies for serious invasions of privacy, and broadening the powers of the ACMA in relation to quantifying compensation for breaches of privacy.

Free TV is of the view that regulatory creep in the form of additional layers of privacy regulation would have the effect of increasing regulatory costs for broadcasters in an area of law where there is already an excessive amount of regulation. This is not justified in circumstances where there is no evidence of any significant problem.

Threshold question: Should a Statutory Cause of Action be introduced?

As stated above, Free TV is opposed to a statutory cause of action for serious invasions of privacy. Free TV remains of the view that there is no public policy or evidential basis for the introduction of a statutory cause of action.

1. Current protections are extensive

The existing privacy regime applicable to broadcasters provides a strong level of privacy protection for individuals.

As outlined in Free TV's submission to the ALRC's Issues Paper, its members are subject to a comprehensive set of privacy laws, some of which apply to organisations generally, some of which place specific limits on how broadcasters 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, across a range of jurisdictions, and often not in a consistent or easily decipherable manner. These laws include Commonwealth, State and Territory legislation and the common law, as well as industry codes of practice, including in particular, the Commercial Television Industry Code of Practice ("**the Code**"), and the ACMA's Privacy Guidelines for broadcasters ("**the Guidelines**") (which supplement the Code).

The process for making complaints to the ACMA in relation to breaches of the Code and the Guidelines is thorough, free for complainants and can lead to serious consequences for broadcasters. The process is detailed further in the Guidelines and on the ACMA website.[1]

The Code is subject to review every three years. In accordance with s 123 of the *Broadcasting Services Act 1992*, the Code cannot be registered unless:

- The Code provides appropriate safeguards for the matters it covers; and
- There has been adequate public consultation on the Code.

A review of the Code is currently underway. In undertaking this review, Free TV will have regard to the ACMA's findings arising out of the *Contemporary Community Safeguards Inquiry*, in relation to the content of contemporary broadcasting codes of practice, including in relation to privacy issues and the ethical standards of broadcasters, in the context of ensuring that adequate measures are in place, via the Code, to protect the public against what are considered to be unreasonable privacy intrusions.[2]

The current regulatory framework is very effective in ensuring that the privacy rights of individuals are protected. Further legislation is unnecessary and would simply increase regulatory uncertainty and act as a deterrent to the effective reporting of news and current affairs.

2. There is no demonstrated need

As argued in Free TV's submission to the Issues Paper, no inadequacy in relation to the protection currently afforded privacy by statute and common law has been demonstrated.

Free TV's 2011 submission to the Department of the Prime Minister and Cabinet indicated that from 2006 - 2011; privacy complaints represented just 3.3% of complaints overall received by broadcasters.

Since 2011, these figures have declined:

- From 2008 to 2013 privacy complaints represented 3.2% of overall complaints received; and
- From 2011 to 2013, privacy complaints represented just 1.8% of overall complaints received by broadcasters.

Additionally, the 2012-13 Annual Report of the ACMA showed that, while there were a total of 2178 enquiries and written complaints about commercial, national and community broadcasters during 2012-13, there were only 2 breach findings relating to privacy by commercial television broadcasters, and 3 non-breach findings.

In the foreword to the 2011 Issues Paper "A Commonwealth Statutory Case of Action for Serious Invasion of Privacy", produced by the Department of Prime Minister and Cabinet, the Hon Brendan O'Connor noted, "serious invasions of privacy are infrequent".

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[1] ACMA, *Privacy guidelines for broadcasters*, December 2011, Figure 1 *Steps to determining a breach of the code privacy provisions*, at 3. Information about how to make complaints is available on the ACMA website at: http://www.acma.gov.au/theACMA/About/The-ACMA-story/Regulating/how-to-make-a-report-or-complaint

[2] ACMA, *Contemporary Community Safeguards Inquiry*, Issues Paper, June 2013, at 53-57.

Therefore, an additional statutory cause of action would only serve to impose additional regulatory obligations on broadcasters. It would act as an unnecessary impediment to broadcasters' business practices, contrary to principles of good regulatory practice and evidence-based policy making. It would encourage individuals to pursue litigation, with the main goal being personal financial benefit, in circumstances where there are already both criminal and civil avenues for redress available. It is also noteworthy that a statutory cause of action such as the one proposed will only benefit the small number of plaintiffs that are sufficiently financially well-off to fund such litigation, which is likely to be lengthy and expensive.

3. No 'counterbalancing' statutory right of freedom of communication currently exists

As highlighted in Free TV's response to the Issues Paper, unlike other jurisdictions, Australia does not have a 'counterbalancing' statutory right of freedom of communication or freedom for the media to seek out and disseminate information of public concern.

Therefore, a 'counterbalance' in the form of a right to privacy is not necessary in circumstances where no statutory right of freedom of communication exists. Any statutory cause of action would not operate to 'harmonise' Australian laws with those of the UK or the US, which operate in the context of a Bill of Rights (in the case of the UK) and constitutional freedoms (in the case of the US), and which are strongly upheld in those jurisdictions.

In Australia in the current landscape, a statutory cause of action would simply add an additional layer of regulation and complexity, in circumstances where there is no gap or demonstrated need in the existing legal framework, and where no counterbalancing right of communication exists.

4. Need to ensure privacy laws are relevant in the evolving technological and social context

Recent and evolving technologies do not require an additional layer of privacy protection in the form of a statutory cause of action for serious invasions of privacy.

Existing laws in relation to privacy including the Privacy Act and the privacy provisions of the Code are drafted in a manner that is technology-neutral. While developments in technology mean that information can be disseminated to more people more quickly, those technological developments have not resulted in an increase in broadcasters misusing private information. Broadcasters continue to apply great diligence in protecting individuals' privacy in the course of their operations, across all platforms and technologies. As indicated above, the very low number of privacy complaints brought against broadcasters evidences the diligence that is exercised.

In the context of an evolving technological and social media environment, individuals' expectations of privacy are changing and are also highly variable from individual to individual (and particularly across generations). This new environment makes it extremely difficult, from a public policy perspective, to codify what should constitute a serious invasion of privacy. It also consequently makes it very difficult for organisations to decipher what kind of conduct is being proscribed. In this sense, an over-arching statutory cause of action will not necessarily 'fit' the current social context, given that it is becoming decreasingly possible to ascertain what a particular person's reasonable expectations of privacy might be.

The current social media environment supports individual choice by giving consumers the ability to choose how they engage with social media, and what and with whom they communicate. Over-regulation or inappropriate regulation in the area of privacy will stifle these kinds of activities and act as a deterrent to engaging in this new environment.

The proposed tort of privacy

The ALRC's terms of reference require it to consider what a cause of action for serious invasions of privacy should look like, if such a cause of action were to be introduced.

As indicated above, Free TV is of the view that there is no public policy or evidential basis for the introduction of a statutory cause of action.

If such a cause of action were under consideration, Free TV is of the view that the ALRC's proposal in its current form risks unreasonably encroaching on freedom of speech and freedom of communication. The following aspects of the proposed cause of action would be particularly detrimental:

- any application of the cause of action to reckless conduct. News and current affairs reporting takes place under strict time constraints that require rapid evaluation of material. In these circumstances, penalties for reckless breaches would be likely to introduce a level of conservatism that may prevent or delay the reporting of news, because the test for "recklessness" in law carries with it a necessary value judgment about what is a reasonable or unreasonable risk.
- any failure to include public interest and consent as defences in addition to requiring a court to weigh up whether the plaintiff's interest in privacy outweighs the defendant's interest in freedom of expression and any broader public interest, as an element of the cause of action. Defences operate quite differently from provisions which allow a court to balance a number of factors to determine which should take precedence in a particular case. For example, a defence of consent would prevent the plaintiff from succeeding in establishing a cause of action if the defendant can prove that the plaintiff in fact consented. It would therefore provide a degree of certainty to the defendant that, if consent has been obtained, then the law has been complied with. However, if consent is simply a factor that is weighed against other factors in order to determine whether a matter may proceed to be heard, a court may choose to place less weight on the fact that the plaintiff consented, at its discretion. The defences of public interest and consent should be included in addition to any balancing provision to determine whether the plaintiff has a cause of action.
- any failure to require the plaintiff to prove damage in order to bring an action under the new tort. The absence of such a requirement would significantly increase the risk of the cause of action being misused and simply encouraging litigation in circumstances where there is a clear public interest in dissemination of the relevant private information.

Should a tort of harassment be introduced to prevent and redress serious invasions of privacy instead?

As outlined above, there is no identified gap in the existing privacy law framework.

The framework is extensive, effective in protecting individuals and is working well.

Therefore, while Free TV supports uniform laws across Australian States and Territories, it does not support any move to supplement existing laws with an additional layer of legislation or regulation, whether by way of a statutory tort of privacy, or a statutory tort of harassment.

An additional statutory cause of action, whether it is for serious breaches of privacy or for harassment, would impose additional regulatory obligations on broadcasters and act as an unnecessary impediment to broadcasters' business practices, contrary to principles of good regulatory practice and evidence-based policy making. As with a statutory case of action for serious invasions of privacy, a statutory cause of action for harassment would encourage individuals to pursue litigation in circumstances where there are already both criminal and civil avenues for redress available.

If a uniform law across Australian States and Territories is considered, it is fundamental that an appropriate exemption for the reporting of news and current affairs in the public interest is included.

Broadening remedies for breach of confidence

Free TV also does not support any broadening of the scope of breach of confidence remedies for serious invasions of privacy.

The ALRC notes that very few cases have awarded equitable compensation for breach of confidence, with the case of *Giller v Procopets* remaining the sole appellate authority for the recovery of compensation of emotional distress in a breach of confidence action, over five years after it was decided.[3]

Free TV is of the view that this is a reflection of the fact that very few matters of this nature have gone before the courts. As the ALRC has identified, the development breach of confidence at common law may well lead to damages for emotional distress being granted in appropriate cases. This is a matter that should be left to develop at common law.

Uniform surveillance devices legislation

Free TV welcomes the ALRC's proposal that legislation in relation to surveillance devices should be uniform across Australian States and Territories, and that such legislation should include a public interest defence or exception.

As noted by the ALRC, inconsistency in this area of law means that organisations with legitimate uses for surveillance devices face increased uncertainty and regulatory burden.[4] A technologically neutral definition of 'surveillance device' would further promote consistency across devices.

Any such legislation should include a public interest defence or exception, to achieve an appropriate balance between the need for regulation of the use of surveillance devices to protect an individual's privacy, and the need for journalists to use such devices as part of their role in providing important news and current affairs coverage.

[3] ALRC Discussion Paper 80, *Serious Invasions of Privacy in the Digital Era*, at 184.

[4] ALRC Discussion Paper 80, *Serious Invasions of Privacy in the Digital Era,* at 197.

Responsible use of surveillance devices can lead to news stories that uncover corruption, illegal behaviour, or behaviour that endangers the community, among other matters.

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.

Proposed new ACMA power to quantify damages

Free TV opposes any broadening of the powers of the ACMA in relation to quantifying compensation for breaches of privacy in breach of a broadcasting code of practice.

An extension of the ACMA's powers in this way would be at odds with its functions, set out in Part 2 of the *Australian Communications and Media Authority Act 2005* (**ACMA Act**). Unlike the OAIC, which has specific functions in relation to the protection of the privacy of individuals,[5] the ACMA is primarily tasked with regulating industry, including by way of determining industry standards and compliance with industry codes.[6]

As indicated above, as part of these functions the ACMA can impose additional licence conditions on broadcasters, suspend or cancel licences which it has granted to broadcasters, as well as impose significant civil and criminal penalties. In the ordinary course of carrying out its functions, the ACMA does not currently quantify damages. It would require a significant extension of its powers and resources to properly perform this additional function. Free TV considers this is a judicial function best left to the courts, which are tasked with enforcing such determinations.

The ALRC suggests that this expansion of the ACMA's functions would deter broadcasters from invading individuals' privacy.[7] However as indicated above, the complaints data does not suggest that such deterrence is required. The ALRC also notes in its Discussion Paper that 'the ACMA's figures indicate that the additional power proposed may be rarely used'.[8] It is therefore unclear how this type of expansion of the ACMA's functions and resources required to perform those functions, is justified.

Adverse consequences of complicating existing privacy laws with additional layers of regulation

As indicated in Free TV's submission to the Issues Paper, increasing the regulatory burden on broadcasters by introducing a statutory cause of action, either for serious invasion of privacy or for harassment, or by expanding the ACMA's current functions

[5] *Australian Information Commissioner Act 2010*, s 9.

[6] *ACMA Act*, Part 2.

[7] ALRC Discussion Paper 80, *Serious Invasions of Privacy in the Digital Era,* at 222.

[8] ALRC Discussion Paper 80, *Serious Invasions of Privacy in the Digital Era,* at 223.

with respect to serious invasion of privacy, will have a number of detrimental economic consequences. It will:

- Have a deterrent effect on news and journalism, and increase uncertainty;
- Lead to an increase in the number of court actions, and in practice will mean that Free TV members and other organisations will have to make sure that they are insured for such actions;
- Increase the regulatory burden on organisations;
- Require organisations to increase their investment in protecting against such actions by way of reviewing current practices, staff training etc;
- Require Free TV members and others to invest significant resources in defending such actions if they are brought;
- Lead to an increase in frivolous or speculative actions;
- Act as a disincentive to organisations to fully utilise new communications tools such as social media sites;
- Act as a disincentive to social media sites to innovate.