

22 November 2013

The Hon John Rau MP
Attorney-General
Parliament House
ADELAIDE SA 5000

Dear Attorney-General,

We are writing regarding the *Surveillance Devices Bill 2012* (the Bill) which we understand may be debated by the South Australian Parliament during the final sitting week of 2013.

We are greatly concerned that the Bill does not properly balance the competing interests of protection of privacy and the public interest. In our view, proper weight is not given to the principles of freedom of speech and communication, and the free flow of information in the public interest. We urge extreme caution in considering the draft legislation which in our view imposes excessive restrictions on the ability to gather information in the public interest.

Concerns with the Bill

Firstly, regarding the Bill, we are concerned that it:

- Restricts the publication of communication of material obtained using a surveillance device;
- Narrows the public interest exception that applies to the use of listening devices; and
- Lacks any public interest exception for the use of optical surveillance devices.

Additionally, it does not appear that there is evidence to support a requirement to 'fix' the existing law. It is disappointing that the first pillar of good policy making – that there is an identified and well understood problem that requires intervention – is absent; and yet a 'solution' is being pursued in this instance. This is not an approach to policy and legislative development that should be allowed to proceed.

Concerns with the Committee recommendations

We also do not agree with recommendations 3, 4 and 5 of the Legislative Review Committee's report, *Issues relating to Surveillance Devices* (the Committee Report). Our concerns regarding each recommendation are detailed below:

- Recommendation 3 – establishes circumstances where a person is able to communicate or publish surveillance device material acquired to protect their lawful interests. The proposed scope of this recommendation is very narrow (including preventing telling a friend or family member, a government authority except the SA police, the media, and Members of Parliament). We believe that material acquired by an individual for the purpose of protecting their lawful interests must not be hindered or limited, and must be able to be communicated or published if there is a public interest in doing so.
- Recommendation 4 – prevents the use of a covert surveillance device in the public interest, except if circumstances are urgent and serious. The circumstances of 'urgent and serious' are subjective, unclear and uncertain; and restrictive. Therefore a public interest exception will be subject to discretionary judgement, and is likely inaccessible. The effect of such is

that news gathering is stifled due to the subjective and restrictive nature of the public interest exception. We do not support such vague and nebulous concepts that undermine freedom of communication.

- Recommendation 5 – prohibits communication, publication or access to information acquired from the covert use of a surveillance device in the public interest unless a court order has been obtained. The effect of such a pre-publication regime is that it hinders the free flow of information and effectively prevents the activity from taking place – even when the surveillance device is used in the public interest in a serious and urgent situation. We do not agree that judicial pre-approval is appropriate for the communication or publication of material obtained using a surveillance device in the public interest.

In aggregate, these recommendations would effectively prohibit the acquisition and communication of surveillance device material where there is a public interest. This is not an outcome that the parties to this correspondence find acceptable – for themselves or the people of South Australia.

Recommendation

Freedom of speech and communication, and the ensuing free flow of information, is a crucial element of Australia’s democracy. Given the issues with the Bill outlined above, we recommend that the Bill not proceed.

However, if the government is minded to proceed with the Bill we recommend that the proposed Government amendments of January 2013 (attached) – which address our concerns – be moved and agreed.

For clarity, any amendments to support recommendations 3, 4 and 5 (individually and in aggregate) of the Committee Report should not be progressed in any way.

Lastly, we note our views are in line with concerns expressed in submissions from FreeTV and the ABC earlier this year.

We trust this is useful input into your deliberations regarding the *Surveillance Devices Bill 2012*.

