

The Civil Surveillance Review Team
Legislation, Policy and Programs
ACT Justice and Community Directorate
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By email: JACSLPP@act.gov.au

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Dear Sir/Madam

REVIEW OF CIVIL SURVEILLANCE IN THE ACT

The Insurance Council of Australia¹ (the Insurance Council) welcomes the opportunity to comment on the recommendations contained within the *Review of ACT Civil Surveillance Regulation Report* (the Report). The Insurance Council is supportive of appropriate regulation to encourage the responsible use of surveillance technology. Insurers are generally subject to the Australian Privacy Principles (APPs) and recognise the importance of robust privacy protections. However, the industry has significant concerns about the implications of the proposed recommendations for surveillance used in managing and handling the assessment of insurance claims.

The Insurance Council submits that robust privacy protections could be implemented within a regulatory framework which also provides clear rules for legitimate surveillance activities. As part of this, the Insurance Council would support a licensing regime to effectively regulate investigation agents, including those utilised by insurers.

The Insurance Council's submission comments on the use of surveillance by the general insurance industry, key recommendations of the report and the need for nationally consistent regulation of civil surveillance.

¹ The Insurance Council of Australia is the representative body of the general insurance industry in Australia. Our members represent more than 90 percent of total premium income written by private sector general insurers. Insurance Council members, both insurers and reinsurers, are a significant part of the financial services system. June 2016 Australian Prudential Regulation Authority statistics show that the private sector insurance industry generates gross written premium of \$43.9 billion per annum and has total assets of \$122.6 billion. The industry employs approximately 60,000 people and on average pays out about \$124.0 million in claims each working day.

Insurance Council members provide insurance products ranging from those usually purchased by individuals (such as home and contents insurance, travel insurance, motor vehicle insurance) to those purchased by small businesses and larger organisations (such as product and public liability insurance, professional indemnity insurance, commercial property, and directors and officers insurance).

1. Surveillance in the insurance industry

In assessing insurance claims for payment, insurers are sometimes required to undertake targeted surveillance activity; for example, to investigate fraudulent and/or exaggerated claims and to survey areas that are inaccessible due to natural disasters. The Insurance Council submits that the ability of insurers and their agents to appropriately conduct legitimate surveillance activities is critical. The Australian Law Reform Commission (ALRC), in its review of serious invasions of privacy in the digital era, recognised the legitimacy of insurance surveillance activities and the need for privacy protections to permit appropriate surveillance by the industry.²

The Insurance Council is concerned that recommendations in the Report could significantly curtail the ability of insurers to conduct surveillance. Ultimately, the inability to conduct surveillance will have a detrimental impact for all insurance policyholders, where claims assessment processes could be unduly lengthened. Importantly, hampering the ability of insurers to investigate suspected fraudulent claims would increase the cost of insurance generally for consumers.

It is particularly critical that insurers are able to investigate fraudulent or exaggerated claims, including claims made by policyholders and claims made by third-parties against policyholders. The estimated annual cost of fraud to the general insurance industry is over \$2 billion³. This is ultimately passed onto the general public in terms of increased premiums.

For example, in NSW an increase in claims fraud and exaggeration within the NSW Compulsory Third Party (CTP) scheme has placed substantial upward pressure on the average premium. In a report published by the NSW CTP scheme regulator, it is estimated that the additional cost to NSW motorists for fraudulent and exaggerated claims is as much as \$400 million per year.⁴ As a result, NSW CTP insurers have been asked to implement a more rigorous approach in identifying and responding to fraudulent claims.

Indeed, under the ACT *Road Transport (Third-Party Insurance) Act 2008*⁵, CTP insurers have a legislative obligation to deter fraud. Without sufficient exemptions for insurers to carry out fraud investigations, the proposed surveillance regulation will place conflicting regulatory obligations on insurers.

2. Report recommendations

2.1. Scope of regulation

The Report recommends that the *Listening Devices Act 1992* (the Act) be renamed the Surveillance Act and amended to include restrictions on other forms of surveillance activity, including visual observation, tracking and data collection. The Report suggests that the expansion of regulation to these other forms of surveillance is consistent with developments

² Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, September 2014.

³ Insurance Fraud Bureau of Australia, www.ifbintelligence.com.

⁴ State Insurance Regulatory Authority, *Deterring fraudulent and exaggerated claims in the NSW CTP insurance scheme*, August 2016, p5.

⁵ See Section 176.

in other jurisdictions where surveillance legislation has been amended to be technology neutral. However, the Insurance Council is concerned that the proposed expansion of the Act is not accompanied by an exception to allow surveillance of activities that either occur in or can be viewed from a public place.

We note that the South Australian *Surveillance Devices Act 2016*, referenced in the Report, allows (in sections 3 and 5) surveillance of activities that either occur in or can be viewed from a public place. Similar exceptions are also contained in the Victorian and Western Australian legislation.

While the Report recommends that the protection of private conversations or activities be limited where the parties can reasonably expect to be overheard or observed by others, there remains ambiguity in how private activities occurring in public places will be treated. We note that section 3 of the South Australian Act defines private activity to not include:

- i) an activity carried on in a public place; or
- ii) an activity carried on or in premises or a vehicle if the activity can be readily observed from a public place; or
- iii) an activity carried on in any other circumstances in which the person ought reasonably to expect that it may be observed by some other person.

While the proposed inclusion of exceptions in the legislation around lawful interests and public interest will be helpful, appropriately defining the scope of activities permitted is critical. The ability of insurers to undertake targeted surveillance will be significantly curtailed without a regime that clearly defines permissible and prohibited surveillance. A clear exception for certain surveillance activities in public places is necessary for most insurance surveillance which is undertaken in public places.

It is also important that any prohibition on using or communicating existing information/data needs to be carefully framed so that it does not unintentionally catch the use or communication of information that is observed or posted in the public arena which would normally not be considered to be 'surveillance' (e.g. news articles which could be online or in paper form).

In refining the scope of the legislation, we also note that the Report discusses “non-government surveillance” without defining the activities this captures. This creates ambiguity for insurance classes where the insurer acts as authorised agent under government underwritten insurance schemes; including CTP and workers compensation insurance. Clarity is required around the ambit of civil surveillance to be captured by the legislation.

2.2. Lawful interests exception

The Report recommends that any exemption allowing surveillance or communication of the results of surveillance for the reasonable protection of a person’s lawful interests requires an objective evaluation of the purposes for which surveillance or communication is carried out, and whether that surveillance or communication was necessary and proportionate.

We understand the rationale for incorporating an objective evaluation is to recognise that a lawful interest does not require that there be a legally enforceable right, duty or liability. However, the recommendation as proposed introduces too much uncertainty into an

otherwise straightforward interpretation of lawful interests to include contractual rights and the defence of a claim from an insurance perspective. We note that the APPs have clear exemptions in this area.

We also note the importance of the exception to be sufficiently broad to capture corporations and that consent is not a prerequisite to falling within the exception. The current wording of the Act may be seen to exclude corporations and requires that consent be given.

2.3. Public interest exception

The Report recommends that communication of the results of surveillance should require a court order unless the communication is to a media organisation subject to an appropriate code of conduct. We consider that having to wait for a court to decide whether the results of surveillance can be communicated is not practical and increases litigation and demands on court resources. We note that where concerns in communicating the results of surveillance relate to the privacy of other parties, there are more pragmatic solutions available (such as the use of pixilation).

2.4. Notice and issues of consent

The Report recommends that consent in the context of surveillance or communication of the results of surveillance requires the individual giving consent be adequately informed; consents voluntarily; the consent is current and specific; and has the capacity to understand and communicate their consent. While consent provides a clear defence for some surveillance activities, seeking consent of the individual subject to surveillance generally presents a challenge from an insurance perspective.

Insurance claimants are unlikely to expressly consent to being monitored by surveillance. While consent could be sought when the insurance policy was initially issued, this will not be effective where third parties, who are not the policyholder, are the subject of surveillance as would typically be the case in suspected personal injury fraud.

2.5. Developments in surveillance technology

Insurers commonly use drones for insurance assessing work, for example, to inspect storm damage following an insured event. The use of drones is particularly essential where access to an area following a natural catastrophe is limited or unsafe due to extensive damage. The recommendation that any prohibition does not extend to inadvertent observation is helpful in this regard.

The Report's commentary on wearable technology, location tracking and access to data on computer systems demonstrates the complexity of managing privacy risks with developments in highly mobile technology. Practical issues arise where a person or data moves in or out of the ACT. Questions arise as to the laws of which jurisdiction would apply; for example, where a claim was made in another state but the claimant travels to the ACT, or where the claim was made in the ACT but the claimant travels to another jurisdiction.

Similar questions arise in relation to data on computer systems. Will the ACT legislation apply if the person accessing the information is located within the ACT, or will it only apply if the computer system storing the data is located in the ACT? These are practical issues that

require consideration and clarity, and demonstrate the importance of nationally consistent regulation of surveillance.

The proposed application of the legislation to social media also requires further consideration and clarification. In particular, where social media account users have made data public in their privacy settings, would this data be considered to be public information and therefore not subject to surveillance prohibitions?

2.6. Security and investigation professions

The Report recommends that in the absence of an effective licensing system being introduced in the ACT, private investigators or others who carry out surveillance activities for remuneration should not be the subject of exemptions to surveillance offences or allowed to communicate or publish the results of surveillance. We understand that this recommendation relates to the availability of any special exemptions for private investigators, and that it would not affect investigators from undertaking surveillance that is otherwise permissible without such exemptions.

The Insurance Council is supportive of a licensing system being introduced for investigation agents, which would ensure that when it is deemed necessary, surveillance can be used to investigate claims in a manner that is appropriate and proportionate. The Report refers to the licensing regime that has been introduced in South Australia. The licensing of investigation agents recognises that surveillance can be used for legitimate purposes, and provides a regulatory framework that balances the need to protect individual privacy with the need for pragmatic rules and certainty around permissible conduct.

2.7. Use in court proceedings

The Report recommends that a court should have discretion to admit evidence obtained through use of a surveillance device where the recording was intended at the time of the recording, whether reasonably or not, to be used to protect a principal party's lawful interests. The Insurance Council submits that enabling court discretion to admit evidence seems unnecessary, unless it relates to evidence that was obtained contrary to the legislation. A discretion also implies that a court could determine evidence was inadmissible even if it was legally obtained.

2.8. Remedial options

The Report recommends that consideration be given to expanding the range of remedial options available for contravention of the proposed Surveillance Act, including allowing access to the ACT Civil and Administrative Tribunal to seek low level monetary compensation. We note that determining monetary compensation is likely to be a complex exercise, as developing an objective set of factors to provide a basis for such determinations will be difficult.

3. National framework for surveillance regulation

The Insurance Council has consistently argued for a national set of privacy and surveillance rules. At the minimum, privacy and surveillance legislation across State and Territory jurisdictions should be consistent. The current patchwork of regulation makes compliance for

businesses operating at the national level unnecessarily complex, given the policy objectives of privacy and surveillance regulation should not differ between jurisdictions. As already noted in our submission, the development of increasingly mobile forms of surveillance technology will continue to exacerbate difficulties in determining which jurisdictions' rules should apply.

As noted in the Report, the ALRC's 2014 report into serious invasions of privacy recommended that the significant inconsistencies between existing State and Territory surveillance device laws be reconciled through Commonwealth legislation covering the field of surveillance devices. The NSW Government recently considered remedies for the serious invasion of privacy and concluded that such reform could not effectively be legislated without national agreement.

While the Report provides a valuable assessment of the key issues in regulating surveillance in the ACT, the Insurance Council submits that the ACT should pursue a national reform program to streamline privacy and surveillance legislation. The dialogue for reform could be facilitated through the Coalition of Australian Governments (COAG); which has achieved major social and economic reforms through the establishment of national regulatory regimes; thereby eliminating unnecessary and costly differences amongst Australia's various jurisdictions.

If you have any questions or comments in relation to our submission, please contact John Anning, the Insurance Council's General Manager Policy, Regulation Directorate, on (02) 9253 5121 or janning@insurancecouncil.com.au.

Yours sincerely



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