

**2022**

**REFORM OF AUSTRALIA'S ELECTRONIC SURVEILLANCE FRAMEWORK  
DISCUSSION PAPER**

**Australian Capital Territory Government Response**

## Summary

The ACT Government provides this response on the *Reform of Australia's Electronic Surveillance Framework Discussion Paper* (the Discussion Paper). The response recognises the important role of electronic surveillance for law enforcement and national security and the need for a clear legislative framework for the use of electronic surveillance. However, it also reflects the ACT's status as a human rights jurisdiction.

In the view of the ACT Government any reforms to the current framework should be consistent with established principles of the Australian criminal justice system, the rule of law, and international human rights standards. Additionally, any reforms should not override or detract from safeguards currently available under the *Human Rights Act 2004* (ACT) (the HRA).

## Interaction between ACT and Commonwealth legislation

ACT Policing operations are currently regulated through a combination of Commonwealth and ACT legislation, including the *Surveillance Devices Act 2004* (Cth).

The Discussion Paper states that the *Surveillance Devices Act 2004* does not prohibit electronic surveillance activities. However, the *Surveillance Devices Act 2004* currently preserves the operation of an otherwise-repealed division of the *Australian Federal Police Act 1979* (Cth), which includes a provision providing it is unlawful for an Australian Federal Police official to use a listening device in certain circumstances. This is part of the framework regulating ACT Policing use of recording devices (including overt recording devices, such as body-worn cameras).

If it is intended that a new framework will not preserve the substance of pt II div II of the *Australian Federal Police Act 1979* (and particularly s 12F), we encourage consultation with the ACT Government to ensure that regulation of ACT Policing use of recording devices is appropriate. Indeed, we encourage detailed consultation with the ACT Government on any amendments which specifically affect ACT Policing.

## Criminal law policy issues

### Efficacy of existing offence provisions (Q 1)

The Discussion Paper flags a need to review offences including those in pts 10.6 and 10.7 of the *Criminal Code 1995* (Cth). Having regard to the prevalence of technology-facilitated interpersonal abuse, including in a family violence context, any review of these provisions could usefully include analysis of circumstances in which these offences have been reported to police and the outcome of those reports. Statistical information could be complemented by surveying frontline officers to gauge their familiarity with these provisions and willingness to charge them (compared to other possible responses to reports of these behaviours).

### Electronic surveillance powers for corrective services (Q 3)

The Discussion Paper indicates the Australian Government will 'consider providing... state and territory corrective services with the power to access telecommunications data'. Further information is needed about the use case for such powers, compared to existing powers to monitor offenders, and existing options for police to use electronic surveillance to investigate new serious offending.

### Emergency authorisation (Q 27)

The proposal to have a non-exhaustive definition of the type of 'emergency' which could justify an emergency authorisation is not supported. It should be possible to develop an exhaustive definition of the type of 'emergency' which would justify bypassing court approval, noting court approval is an extremely important safeguard.

In general, emergency authorisations must be subject to appropriate threshold criteria and oversight (for example, prior express approval by a Minister or agency head, followed by retrospective judicial authorisation). Processes for prior approval must balance the inherent seriousness of electronic surveillance with the need for rapid, effective response to emergencies.

## Human rights issues

ACT law enforcement agencies' have obligations under the HRA. These obligations include the obligations under section 40B on public authorities, which includes individual police officers exercising a function under a Territory law:

40B Public authorities must act consistently with human rights

(1) It is unlawful for a public authority—

(a) to act in a way that is incompatible with a human right; or

(b) in making a decision, to fail to give proper consideration to a relevant human right.

In addition, the HRA requires that any limitation on human rights is reasonable and justified in accordance with section 28. That section relevantly provides:

28 Human rights may be limited

(1) Human rights may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society.

(2) In deciding whether a limit is reasonable, all relevant factors must be considered, including the following:

(a) the nature of the right affected;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relationship between the limitation and its purpose;

(e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

This HRA framework does not apply to Commonwealth laws.

To the extent that a new Commonwealth law provides for or authorises surveillance activities currently conducted under ACT laws, it could, potentially, detract from the existing human rights protections around surveillance activity in the ACT. This is an outcome to which the ACT Government would be opposed.

Accordingly, we encourage the Commonwealth to ensure any new legislative regime is consistent with human rights obligations.

Particular issues for consideration in the design of the new framework include:

- To limit arbitrary and unlawful interference with human rights the powers should be exercised within defined parameters and not subject to broad and undefined discretion.

- Consideration of the right to privacy should extend to the privacy of third parties who are not the primary target of the electronic surveillance, but who may nonetheless be affected. Due to the greater risk of capturing data of unrelated third parties, the threshold to justify electronic surveillance of third parties, groups, objects and/or locations should be more stringent.
- Collection and use of tracking information should be subject to safeguards as it can be as intrusive as accessing private communications, noting that this form of surveillance restricts the rights to freedom of movement and freedom of association.
- Targeting groups according to shared characteristics could, potentially, enable profiling according to race, nationality, religion, political conviction or other protected attribute contrary to state and federal anti-discrimination laws. The new framework should contain safeguards to protect against any disproportionate and unreasonable limitation of the right to equality and non-discrimination.
- The new framework should include robust oversight and accountability mechanisms including judicial authorisation of covert electronic surveillance, a requirement for agencies to accurately and transparently report when and how electronic surveillance is used and meaningful penalties for misuse of powers. Oversight of both overt and covert collection of journalists' and media organisations' data is important to protect press freedom, which supports the right to freedom of expression.
- Generally, information should be able to be used and disclosed in a manner that supports investigation and prosecution of serious offences across jurisdictions, provided this is done in a manner consistent with human rights. The use and disclosure provisions should be narrow to ensure the safeguards on collection are not undermined and contain specific guidance for sharing information.
- Any options for sharing information obtained using electronic surveillance with a foreign government should be subject to strict safeguards to prevent disclosure if doing so would expose a person to the death penalty, torture or cruel, inhuman or degrading treatment or punishment.

The ACT Government looks forward to further engagement as Commonwealth work on the new framework is progressed.