

31 January 2019

The Secretary  
Queensland Law Reform Commission  
PO Box 13312  
George Street Post Shop  
BRISBANE QLD 4003

By email: [lawreform.commission@justice.qld.gov.au](mailto:lawreform.commission@justice.qld.gov.au)

Dear Sir/Madam

## **REVIEW OF QUEENSLAND'S LAWS RELATING TO CIVIL SURVEILLANCE**

The Insurance Council of Australia<sup>1</sup> (Insurance Council) appreciates the opportunity to comment on the Queensland Law Reform Commission's Consultation Paper *Review of Queensland's Laws Relating to Civil Surveillance and the Protection of Privacy in the Context of Current and Emerging Technologies* (the Consultation Paper).

The Insurance Council and its members strongly endorse the responsible use of surveillance technology. For example, following a review into the General Insurance Code of Practice, the Insurance Council has recommended that the new Code include mandatory standards on the use of investigators and the use of surveillance to ensure that investigations are carried out only when required and in an appropriate manner. In addition, insurers are bound by the Australian Privacy Principles (APPs) and recognise the importance of robust privacy protections. These protections should be implemented within a regulatory framework which also provides clear rules for legitimate surveillance activities.

The Insurance Council's submission focuses on the use of surveillance by the general insurance industry, key issues raised in the consultation paper, and the need for nationally consistent regulation of civil surveillance.

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<sup>1</sup> The Insurance Council of Australia is the representative body of the general insurance industry in Australia. Our members represent approximately 95 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. September 2018 Australian Prudential Regulation Authority statistics show that the private sector insurance industry generates gross written premium of \$47.2 billion per annum and has total assets of \$121.2 billion. The industry employs approximately 60,000 people and on average pays out about \$124.8 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).

## Scope of a new legislative framework

### *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 to the successful operation of their businesses. The Australian Law Reform Commission (ALRC), in its *Review of Serious Invasions of Privacy in the Digital Era (2014)*, recognised the legitimacy of insurance surveillance activities and the need for privacy protections to permit appropriate surveillance by the industry.

If a new legislative framework impedes the ability of insurers to conduct legitimate surveillance, then the claims assessment processes for all policyholder could be unduly lengthened to the detriment of policyholders. It is also critical that insurers are able to investigate fraudulent or exaggerated claims by both policyholders and by third-parties against policyholders. The estimated annual cost of fraud to the general insurance industry is over \$2 billion<sup>2</sup>. This is ultimately passed onto the general public in terms of increased premiums.

### *Surveillance in public places*

The Insurance Council agrees with the Commission's view that the divide between public and private places "gives rise to different expectations of privacy" (p52). Reflecting this, the South Australian *Surveillance Devices Act 2016* contains an exception (in sections 3 and 5) to allow surveillance of activities that either occur in or can be viewed from a public place. In addition, 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.

Similar exceptions are also contained in the Victorian and Western Australian legislation.

For the insurance industry, appropriately defining the scope of activities permitted is essential. 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 given that most insurance surveillance is undertaken in public places.

### *National framework for surveillance regulation*

The Insurance Council has consistently advocated for a national set of privacy and surveillance rules. As a minimum feature, the Insurance Council supports the Commission's view that the Queensland legislative framework should "aim to achieve reasonable

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<sup>2</sup> Insurance Fraud Bureau of Australia, <https://ifba.org.au/>

consistency with the regulation of civil surveillance in other Australian jurisdictions” (p49). As noted in the Consultation Paper, the *ALRC Serious Invasions of Privacy in the Digital Era Report 2014* recommended that inconsistencies between existing State and Territory surveillance device laws be reconciled through Commonwealth legislation covering the field of surveillance devices.

While the Consultation Paper provides a valuable assessment of the key issues in regulating surveillance in Queensland, the Insurance Council submits that Queensland should work within 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.

In addition to consistency across jurisdictions, reform to Queensland’s legislative framework relating to civil surveillance should avoid unnecessary overlap with the existing surveillance and privacy laws in place, including the *Telecommunications (Interception and Access) Act 1979 (Cth)*, the *Telecommunications Act 1997 (Cth)*, the *Information Privacy Act 2009 (Qld)*, the *Privacy Act 1988 (Cth)*.

#### *Inadvertent monitoring*

Insurers commonly use drones for insurance assessing work, for example, to inspect storm damage following an insured event. The use of drones is particularly effective in facilitating early action on claims where access to an area following a natural catastrophe is limited or unsafe due to extensive damage. However, there is the possibility of unintended privacy breaches. In this regard, the Insurance Council supports the Commission’s view that the proposed legislative framework focuses on deliberate monitoring and excludes inadvertent actions. As noted in the Consultation Paper, this would be consistent with the recommendation in the *ACT Civil Surveillance Regulation Report 2016*.

### **Use of surveillance devices**

#### *Consent of persons subject to surveillance*

The Consultation Paper discusses the use of a surveillance device when an individual consents to the installation or use of the surveillance device. 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.

#### *Lawful interests exception*

The Commission discusses the use of a surveillance device by a party if it is reasonably necessary to protect that party’s lawful interests. The Insurance Council submits that “lawful interests” should be given its natural interpretation and 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.

#### *Public interest exception*

The Commission notes that an exception for the use of a surveillance device in the public interest may be relevant for “a media organisation, journalist, or private investigator” (p76). The consultation paper also notes that in some jurisdictions, communication of the results of surveillance requires a court order. 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 pragmatic solutions available (such as the use of pixilation).

#### *Private investigators and loss adjusters*

As noted in the Consultation Paper, under s6(3) of the *Security Providers Act 1993 (Qld)*, a person is not a private investigator (and does not require a license) if they are a person carrying on the business of insurance or an insurance adjustment agency. The Insurance Council supports 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 Consultation Paper 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. Similarly, the Consultation Paper refers to the NSWLRC Report No 108 (2005) recommending “that an insurer should be authorised to conduct covert surveillance and to contract that work out to an investigator”.

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](mailto:janning@insurancecouncil.com.au).

Yours sincerely



Robert Whelan  
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