



**Australian
Human Rights
Commission**

Privacy and Other Legislation Amendment Bill 2024

Australian Human Rights Commission

Submission to the Legal and Constitutional Affairs Legislation Committee

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1 Introduction

1. The Australian Human Rights Commission (Commission) welcomes the opportunity to make this submission to the Legal and Constitutional Affairs Legislation Committee (Committee) on the *Privacy and Other Legislation Amendment Bill 2024* (Cth) (Bill).
2. Although the Commission is pleased by the introduction of much-needed reforms to the *Privacy Act 1988* (Cth) (Privacy Act), these amendments represent only a fraction of the necessary reforms to which the Federal Government has previously committed.¹ The Privacy Act is not fit-for-purpose, with the Attorney-General previously stating that it ‘has not kept pace with the changes in the digital world’.² While this Bill addresses some of these issues, it does not contain many of the needed reforms. In particular, failing to include the ‘fair and reasonable test’, which would operate as a ‘shield’ against excessive data collection, is a missed opportunity.³
3. The full suite of reform is urgently needed to address the increasing threat to privacy in the modern world. Given the Federal Government has chosen to introduce only limited reform in this Bill, it ought to set out a clear timeline for introducing the further reforms that were previously ‘agreed’ and ‘agreed in principle’.⁴

Recommendation 1: The Federal Government set out a clear timeline for when each ‘agreed’ and ‘agreed in principle’ amendment will be introduced in future tranches.

2 Statutory tort

4. Although several crucial reforms were not included in this first tranche of reforms, the introduction of a statutory tort is a significant improvement for the protection of privacy in Australia.

2.1 Competing tensions

5. Although the introduction of a statutory tort is a significant achievement, the tort must strike an appropriate balance between protecting against infringements of privacy without disproportionately restricting freedom of expression.

6. Submissions by media organisations have previously raised this issue.⁵ Most human rights are not absolute, and circumstances may require a balancing between public interests and intersecting rights. This is a difficult task, but the Commission believes the tort strikes the appropriate measures to allow for journalistic investigations without infringing on rights to privacy.⁶

2.2 Fault element

7. Section 7(1)(c) of Schedule 2 (Serious invasions of privacy) of the Bill requires a serious invasion of privacy to be either intentional or reckless. At a time when invasions of privacy are increasing in frequency and severity the fault element should also cover negligent acts. The Bill relies upon the *Criminal Code Act 1995* (Cth) definition of ‘recklessness’⁷ which requires awareness of a substantial risk. In contrast negligence requires a ‘great falling short of the standard of care that a reasonable person would exercise in the circumstances’.⁸
8. By requiring a specific awareness of risk, it potentially rewards ignorance of privacy obligations and allows individuals to shield themselves from litigation by pleading ignorance. The fault threshold is currently too high, and the fault element should be removed as previously recommended by the Commission.⁹

Recommendation 2: The Federal Government amend s 7(1)(c) in Schedule 2 (Serious invasions of privacy) of the *Privacy and Other Legislation Amendment Bill 2024* (Cth) to remove the fault element.

9. Alternatively, if a fault element is to be retained, the threshold should be lowered to cover negligence.

Recommendation 3: The Federal Government amend s 7(1)(c) in Schedule 2 (Serious invasions of privacy) of the *Privacy and Other Legislation Amendment Bill 2024* (Cth) to include negligent acts.

2.3 Non-restrictive tort

10. The Commission continues to support a non-restrictive cause of action.¹⁰ The Bill limits causes of action to serious invasions of privacy either by:
 - intrusion upon seclusion; or
 - misuse of private information.¹¹

11. This restrictive approach is not responsive to a rapidly changing world where digital innovation has sometimes aimed to ‘move fast and break things’.¹² A non-restrictive approach centred around art 17 of the International Covenant on Civil and Political Rights would be preferable.

Recommendation 4: The Federal Government broaden s 7(1)(a) in Schedule 2 (serious invasions of privacy) of the *Privacy and Other Legislation Amendment Bill 2024 (Cth)* either by removing that section or amending it to better reflect the human right to privacy as set out in article 17 of the International Covenant on Civil and Political Rights.

3 Automated decision-making

12. The introduction of ss 87-89 in Schedule 1, Part 15 (automated decisions and privacy policies) of the Bill greatly increases transparency about the use of personal information in automated decision-making (ADM) processes. It is an important reform which makes valuable steps towards past recommendations the Commission has made about the notification of ADM tools.¹³

13. Transparency about the use and operation of ADM is central to a human-rights-based approach to regulation, as this information may assist individuals in both understanding if ADM tools are used and subsequently enforcing rights.

14. However, the extent to which this amendment will improve transparency may be limited due to the inaccessible nature of privacy policies, with people either not reading them or struggling to understand them.¹⁴

4 Children’s Online Privacy Code

15. The Commission supports the introduction of a Children’s Online Privacy Code which will significantly strengthen privacy protections for children and young people. This Code would provide specific guidance on upholding the best interests of the child in the design of services and collection and use of children’s data.

16. The views of children should be sought and taken into account in the development of this Code. Article 12 of the Convention on the Rights of the Child requires children’s views be heard and given due weight, which ‘[presents] children with an opportunity to identify issues which may interfere with their right to privacy’.¹⁵ Section 26GC(8) in Schedule 1, Part 4

(children’s privacy) of the Bill provides that the OAIC may consult with children and other stakeholders on the Children’s Online Privacy Code. While a welcome inclusion, this language should be strengthened.

Recommendation 5: The Federal Government amend Section 26GC(8) in Schedule 1, Part 4 (children’s privacy) of the *Privacy and Other Legislation Amendment Bill 2024 (Cth)* by replacing the word ‘may’ with ‘must’.

5 Doxxing

17. The Commission has previously indicated its support for balanced reforms that target doxxing.¹⁶ Doxxing impacts various human rights, most directly the right to privacy,¹⁷ which is a cornerstone human right.¹⁸ Doxxing can also violate several other rights, including the rights to:

- equality and non-discrimination
- life
- security
- health
- and can undermine human dignity.¹⁹

5.1 Identifying perpetrators

18. As with many digital criminal offences, those engaging in doxxing may ‘have a degree of anonymity online’ through the use of fake social media profiles and other measures to obscure identities online.²⁰ The inability to identify perpetrators of doxxing will impede accountability and may render criminalisation ineffective.

19. Additionally, where an individual is doxxed by many, it can be difficult to identify a person, or persons, against whom the proceedings can be brought.²¹ We note that such doxxing may not necessarily be coordinated but may occur in parallel, or separately.

5.2 Freedom of expression and doxxing

20. The right to freedom of expression has been described as constituting ‘the foundation stone for every free and democratic society’²² and is enshrined in a range of international and regional human rights instruments.²³ The

right is not absolute and its exercise 'carries with it special duties and responsibilities'.

21. While the right may be subject to certain restrictions, those restrictions must be provided for by law and may only be imposed for 'respect of the rights or reputations of others' or 'for the protection of national security or of public order or of public health or morals'.²⁴ Any such restrictions must also meet strict tests of necessity and proportionality. This requires that any proposed restriction pursues a legitimate aim, is proportionate to that aim, and is no more restrictive than is required for the achievement of that aim.²⁵
22. The proposed criminal offence of doxxing will limit the human right to freedom of expression by restricting certain forms of sharing information. The key issue is ensuring any offence is carefully tailored to meet the strict tests of necessity and proportionality and to avoid capturing reasonable online discourse about a person.
23. One example of a potential risk area is students sharing in online forums the names and subjects taught by teachers at educational institutions. Such a case arose in Germany:

A profile of a teacher was created on a website where students can rate their teachers ... The teacher 'filed a lawsuit seeking the erasure of the data and an injunction restraining the website provider from publishing this information again'.²⁶
24. The relevant court, however, did not grant the request. Given that the students' right to freedom of expression, and that the information was already publicly available on the educational institution's website, the comments were not considered to be defamatory, and further that they did not relate to her private life, but only to her working life as a teacher.²⁷
25. Challenges may also arise concerning online groups created to share information, and warnings about individuals who allegedly engaged in conduct that was abusive, harassing or otherwise inappropriate. For example, a 2022 survey by the Australian Institute of Criminology found that three in four dating app users have experienced harassment when using dating apps.²⁸ Many have turned to social media to share their experiences and warn others about potentially dangerous individuals.²⁹
26. While the sharing of information online in this way has the potential to enhance public safety, there is also a potential risk of digital vigilante

activity, which may see individuals seek to enforce a 'parallel form of criminal justice',³⁰ and can undermine rule of law protections.

27. There are also concerns that doxxing laws may unreasonably capture public interest whistleblowing and journalism.

28. The Bill as currently drafted seeks to guard against these risks by providing that the offences only apply where 'the person engages in the conduct in a way that reasonable persons would regard as being, in all the circumstances, menacing or harassing towards those individuals'.³¹ However, including a provision in the Bill which expressly protects the release of information for legitimate public interest purposes would help to further strengthen the protection of freedom of expression while still effectively addressing the harms caused by doxxing.

Recommendation 6: The Federal Government include a provision in the *Privacy and Other Legislation Amendment Bill 2024 (Cth)* which provides protection for the release of information for legitimate public interest purposes.

6 Recommendations

29. The Commission makes the following recommendations.

Recommendation 1:

The Federal Government set out a clear timeline for when each 'agreed' and 'agreed in principle' amendment will be introduced in future tranches.

Recommendation 2:

The Federal Government amend s 7(1)(c) in Schedule 2 (Serious invasions of privacy) of the Privacy and Other Legislation Amendment Bill 2024 (Cth) to remove the fault element.

Recommendation 3:

The Federal Government amend s 7(1)(c) in Schedule 2 (Serious invasions of privacy) of the Privacy and Other Legislation Amendment Bill 2024 (Cth) to include negligent acts.

Recommendation 4:

The Federal Government broaden s 7(1)(a) in Schedule 2 (serious invasions of privacy) of the Privacy and Other Legislation Amendment Bill 2024 (Cth) either by removing that section or amending it to better

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reflect the human right to privacy as set out in article 17 of the International Covenant on Civil and Political Rights.

Recommendation 5:

The Federal Government amend Section 26GC(8) in Schedule 1, Part 4 (children’s privacy) of the Privacy and Other Legislation Amendment Bill 2024 (Cth) by replacing the word ‘may’ with ‘must’.

Recommendation 6:

The Federal Government include a provision in the *Privacy and Other Legislation Amendment Bill 2024* (Cth) which provides protection for the release of information for legitimate public interest purposes.

Endnotes

- ¹ See generally, Attorney-General's Department, *Government Response Privacy Act Review Report* (Report, 2023).
- ² The Hon Mark Dreyfus KC MP, *Landmark Privacy Act Review report released* (Media Release, 16 February 2023). <<https://ministers.ag.gov.au/media-centre/landmark-privacy-act-review-report-released-16-02-2023>>.
- ³ Attorney-General's Department, *Government Response Privacy Act Review Report* (Report, 2023) 8, proposals 12.1-12.3.
- ⁴ Attorney-General's Department, *Government Response Privacy Act Review Report* (Report, 2023).
- ⁵ See generally Australia's Right to Know, Submissions to the Attorney-General's Department *Discussion Paper* (Submission, 2022); Guardian Australia, Submissions to the Attorney-General's Department *Discussion Paper* (Submission, 2022); SBS, Submissions to the Attorney-General's Department *Discussion Paper* (Submission, 2022); Commercial Radio Australia, Submissions to the Attorney-General's Department *Discussion Paper* (Submission, 2022).
- ⁶ Australian Human Rights Commission, submission to Attorney-General's Department *Privacy Act Review Report 2022* (Submission, April 2022) 46-47 [211]-[217].
- ⁷ See *Criminal Code Act 1995* (Cth) s 5.4.
- ⁸ See *Criminal Code Act 1995* (Cth) s 5.5.
- ⁹ Australian Human Rights Commission, submission to Attorney-General's Department *Privacy Act Review Report 2022* (Submission, April 2022) 47-48 [218]-[220]; Australian Human Rights Commission, *Final Report* (Final Report, 2021) 123.
- ¹⁰ Australian Human Rights Commission, submission to Attorney-General's Department *Privacy Act Review Report 2022* (Submission, April 2022) 48 [221]-[224]; Australian Human Rights Commission, *Final Report* (Final Report, 2021) 123.
- ¹¹ *Privacy and Other Legislation Amendment Bill 2024* (Cth) s 7(1)(a)(i)-(ii).
- ¹² Hemant Taneja, 'The Era of "Move Fast and Break Things" Is Over' *Harvard Business Review* (online, 22 January 2019) <<https://hbr.org/2019/01/the-era-of-move-fast-and-break-things-is-over>>.
- ¹³ See generally Australian Human Rights Commission, *Final Report* (Final Report, 2021) recs 2 & 10.
- ¹⁴ Consumer Policy Research Centre, *In whose interest? Why businesses need to keep consumers safe and treat their data with care* (Working Paper, March 2023) 4 citing Consumer Policy Research Centre, *Duped by Design – Manipulative online design: Dark patterns in Australia* (Paper, June 2022) 6.
- ¹⁵ John Tobin (ed), *The UN Convention on the Rights of the Child* (OUP, 2019) 55; see also Committee on the Rights of the Child, *General Comment No. 25* (UN Doc CRC/C/GC/25, 2021) 17-18.
- ¹⁶ See Australian Human Rights Commission, *Public Consultation on Doxxing and Privacy Reforms* (Submission to the Australian Government Attorney General's Department, 28 March 2024).
- ¹⁷ *International Covenant on Civil and Political Rights* art 17 requires States to protect, in law, against the interference or attack on the 'arbitrary or unlawful interference' with an individual's 'privacy, family, home or correspondence'; *Universal Declaration of Human Rights* art 12 states that 'no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation'.

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- ¹⁸ Australian Human Rights Commission, submission to Attorney-General's Department *Privacy Act Review Report 2022* (Submission, April 2022) 6 [15].
- ¹⁹ Batuhan Kuku, 'Personal Data and Personal Safety: Re-examining the Limits of Public Data in the Context of Doxing' (2023) 13(3) *International Data Privacy Law* 182-183.
- ²⁰ Tom Lowrey, 'Federal Government Moves to Criminalise 'Doxing' after Publication of Jewish Australians' WhatsApp Messages', *ABC News* (online, 13 February 2024) <<https://www.abc.net.au/news/2024-02-13/federal-government-to-criminalise-doxing/103458052>>.
- ²¹ See e.g. Harvard Law School, *Should Doxing Be Illegal?* (Webpage) <<https://hls.harvard.edu/clinic-stories/legal-policy-work/should-doxing-be-illegal/>>.
- ²² UN Human Rights Committee, *General Comment No 34 (Article 19: Freedom of opinion and expression)* (UN Doc CCPR/C/GC/34, 12 September 2011) [2].
- ²³ For e.g. *International Covenant on Civil and Political Rights* art 17; *Convention on the Rights of Persons with Disabilities* art 21; *Convention on the Rights of the Child*, art 12; *European Convention on Human Rights*, art 10; *American Convention on Human Rights*, art 13; *African Charter on Human and Peoples' Rights*, art 9; *ASEAN Human Rights Declaration*, art 23.
- ²⁴ *International Covenant on Civil and Political Rights*, art 19(3).
- ²⁵ Frank La Rue, *Annual Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion* (UN Doc A/HRC/14/23, 20 April 2010) [79]-[81]; See also UN Human Rights Committee, *General Comment No 34 (Article 19: Freedom of opinion and expression)* (UN Doc CCPR/C/GC/34, 12 September 2011) [22].
- ²⁶ See Åste Corbridge, 'Responding to Doxing in Australia: Towards a Right to Informational Self-determination?' (2018) 3 *UniSA Student Law Review* 10, citing Claudia Kodde, 'Germany's "Right to Be Forgotten" – between the Freedom of Expression and the Right to Informational Self-determination' (2016) 30(1-2) *International Review of Law, Computers and Technology* 26-27.
- ²⁷ Åste Corbridge, 'Responding to Doxing in Australia: Towards a Right to Informational Self-determination?' (2018) 3 *UniSA Student Law Review* 10.
- ²⁸ Australian Government Institute of Criminology, *Sexual Harassment and Violence Victimisation Among Mobile Dating App and Website Users* (Research Report No. 25, 2022) xi.
- ²⁹ See e.g. Jade Twomey, 'Women Posting Information about Dangerous Ex-lovers 'Absolutely' Creating Defamation Risk', *ABC News* (online, 8 February 2023) <<https://www.abc.net.au/news/2023-02-08/social-pages-like-google-reviews-for-men-online-dating/101906252>>; See e.g. Katherine Gregory, 'A Predator Kept Targeting Victims on Tinder for Years. Why Wasn't He Stopped Sooner?', *ABC News* (online, 7 February 2020) <<https://www.abc.net.au/news/2020-02-07/dating-app-sexual-assault-predator-was-using-dating-profiles/11931586>>.
- ³⁰ Daniel Trottier, 'Digital Vigilantism as Weaponisation of Visibility' (2017) 30 *Philosophy and Technology* 55.
- ³¹ *Privacy and Other Legislation Amendment Bill 2024* (Cth) ss 474.17C(1)(c) & 474.17D(1)(d).