

***Privacy and Other Legislation Amendment
Bill 2024***

*Submission to the Legal and Constitutional Affairs
Legislation Committee*

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I. Introduction

1. The authors of this submission are all experienced scholars of Australian and international privacy and data protection law. Their specialisations and relevant experience are as follows:
 - Prof **Normann Witzleb** is an Associate Professor at The Chinese University of Hong Kong, Faculty of Law, and an adjunct Associate Professor at Monash University, Faculty of Law specialising in privacy and data protection law, torts law and comparative law.
 - Prof **Megan Richardson** is a Professorial Fellow (and retired Professor) at the Melbourne Law School, the University of Melbourne. Her fields of research and publication include privacy and personality rights, law reform, and disruptive effects of new technologies.
 - Dr **Damian Clifford** is a Senior Lecturer in Law at the Australian National University. His research focuses on privacy, data protection and technology regulation, and he has published across these fields.
2. We thank the Legal and Constitutional Affairs Legislation Committee for the opportunity to make a submission in relation to the Privacy and Other Legislation Amendment Bill 2024 ('the Bill').
3. We have contributed, both individually and jointly, to the Privacy Act Review through submissions as follows:
 - a. Castan Centre for Human Rights Law, Monash University, [Submission to the Issues Paper](#) (2020)
 - b. Castan Centre for Human Rights Law, Monash University, [Submission to the Online Privacy Bill Exposure Draft](#) (2021)
 - c. Castan Centre for Human Rights Law and the Centre for Commercial Law and Regulatory Studies, Monash University, [Submission to the Discussion Paper](#) (2022)
 - d. Castan Centre for Human Rights Law and the Centre for Commercial Law and Regulatory Studies, Monash University, & Media and Communications Law Research Network, The University of Melbourne, [Submission to respond the Government Response](#) (2023)
 - e. Centre for AI and Digital Ethics, University of Melbourne, [Submission to the Issues Paper](#) (2020)
 - f. Humanising Machine Intelligence Project, Australian National University, [Submission to the Issues Paper](#) (2020)
 - g. Megan Richardson, Melbourne Law School, The University of Melbourne (2022), [Submission to the Discussion Paper](#) (2022)
 - h. Normann Witzleb, [Submission to Public Consultation on Doxxing and Privacy Reforms](#) (2024).

4. This present submission limits itself to the statutory tort for the serious invasion of privacy.
5. In addition to this submission, we make the following of our relevant publications available to the Review Team:
 - Megan Richardson, Barbara McDonald, Normann Witzleb, David Vaile and Graham Greenleaf, *Would a Statutory Privacy Tort in Australia Harm Valuable Free Speech?* (2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3785697
 - Normann Witzleb, 'The Case for Negligence as the Mental Element of an Australian Statutory Privacy Tort' (2023) 29 *Tort Law Review* 3.

II. Executive Summary

6. This submission is limited to the proposed introduction of a new statutory tort for serious invasions of privacy: Privacy and Other Legislation Amendment Bill 2024, Sch. 2.
7. **We welcome the introduction of a new statutory tort for serious invasions of privacy.**
8. **We submit**, however, that the **journalism exemption** in cl. 15 of Sch. 2 **should not become law.**
9. In particular, we put forward that this exemption:
 - a. Deviates from the ALRC tort;
 - b. Disregards the support that the ALRC tort had in subsequent law reform enquiries;
 - c. Would be harmful;
 - d. Is unprincipled;
 - e. Has no international equivalents.

III. The new statutory tort is welcome

10. We **welcome** the introduction of a new statutory tort for serious invasions of privacy. The question of whether a statutory privacy tort should be introduced has been considered many times over the last twenty-five years or more. During this time, major common law jurisdictions, including Canada, New Zealand and the United Kingdom have created stronger protections for privacy under tort law. This was more

commonly achieved through judicial development of the common law, but in some Canadian provinces also through a statutory tort.

11. In contrast, victims of privacy invasion in Australia need until the present day to rely on a patchwork of general law and statutory provisions that applies to specific aspects of privacy but does not provide comprehensive protection.
12. A statutory right to privacy, actionable as a tort, would not supplant the existing mechanisms, but instead address an important gap in the protection of privacy interests and provide suitable remedies to victims of privacy invasion, including damages and injunctions. In light of the unanimous support over many years for legislative action by successive law reform and parliamentary inquiries, which all included public consultation processes, it is welcome that the federal Government has decided to enact a statutory privacy tort.

IV. The journalism exemption should be abandoned

13. While we favour the introduction of a privacy tort, the Bill has a severe defect. Clause 15 of Schedule 2 is a new clause, introduced at the Bill stage, which would introduce a broad exemption for acts of journalists, their assistants and their employers.
14. The text of cl 15 is as follows:

15 Journalists etc.

(1) This Schedule does not apply to an invasion of privacy by any of the following to the extent that the invasion of privacy involves the collection, preparation for publication or publication of journalistic material:

- (a) a journalist;*
- (b) an employer of a journalist;*
- (c) a person assisting a journalist who is employed or engaged by the journalist's employer; (d) a person assisting a journalist in the person's professional capacity.*

(2) A journalist is a person who:

- (a) works in a professional capacity as a journalist; and*
- (b) is subject to:*
 - (i) standards of professional conduct that apply to journalists; or*
 - (ii) a code of practice that applies to journalists.*

(3) Material is journalistic material if it:

- (a) has the character of news, current affairs or a documentary; or*

(b) consists of commentary or opinion on, or analysis of, news, current affairs or a documentary.

(4) For the purposes of this clause, if a journalist invades an individual's privacy, it is immaterial whether the invasion of privacy breaches the standards or the code of practice to which the journalist is subject.

15. We submit that this exemption (the 'journalism exemption') should be abandoned and not form part of any statutory tort as enacted. Below we explain our reasons:

a. The ALRC tort did not contain a journalism exemption

16. The privacy tort in the Bill builds on the model developed by the Australian Law Reform Commission in its Report 'Serious Invasions of Privacy in the Digital Era' (ALRC Report 123).¹ However, the ALRC tort did not contain a full exemption for journalists and journalistic materials from its scope.
17. The ALRC considered submissions by some media organisations who expressed a preference for the introduction of a media exemption. The ALRC expressly rejected to introduce such an exemption with the following consideration, which we share:

However, the fault requirement and the public interest balancing process already provide significant protection for the media.²

18. The proposed exemption would mean that any acts that covered by the exemption, no matter how seriously they invade a person's privacy or how flagrant the breach, would not be actionable as a tort.
19. This nullifies the protection in the practically important of media intrusions into privacy that the ALRC tort was intended to bring to potential victims of privacy invasion.

b. The ALRC tort has been widely accepted in reform enquiries

20. ALRC Report 123 provided a careful analysis of the need for a statutory action to protect privacy. The recommendations of the ALRC were the result of extensive community consultation and took into account comparative research into the law in

¹ Australian Law Reform Commission (ALRC), *Serious Invasions of Privacy in the Digital Era*, Report No 123 (2014).

² *Ibid*, [11.155].

other jurisdictions. These recommendations have been referred to, generally with approval, in all subsequent Australian law reform enquiries on the matter.

21. In March 2016, the Legislative Council of the New South Wales Parliament reported on its inquiry into the remedies for a serious invasion of privacy.³ The Legislative Council's Standing Committee on Law and Justice recommended the introduction of a statutory tort by the NSW Parliament.⁴ It recommended that the statutory tort be based on the model proposed in the 2014 ALRC report.⁵ Shortly afterwards, the South Australian Law Reform Committee also proposed a statutory tort for serious invasions of personal privacy.⁶
22. In July 2019, the Australian Competition and Consumer Commission (ACCC) added its voice in support of the introduction of a statutory tort for serious invasions of privacy. In the Final Report of its major inquiry into Digital Platforms, the ACCC proposed that the statutory privacy tort should be enacted in the form recommended by the Australian Law Reform Commission (ALRC) in 2014. In December 2019, in the context of its ongoing inquiry into Human Rights and Technology, the Australian Human Rights Commission (AHRC) also proposed that this ALRC recommendation be implemented.
23. The Attorney-General Department's Privacy Act Review Report (2022) also supported enactment of the statutory tort as recommended by the ALRC (in proposal 27.1).
24. None of these enquiries suggested the need for a journalism exemption to the statutory tort. Indeed, as stated in the Attorney-General's Department's Report:

'[t]he protections for journalism in the ALRC model are extensive and any chilling effect on journalism is hoped to be minimal'.⁷

c. The exemption would be harmful

25. The journalism exemption, being framed in blanket terms, and stating expressly in cl 15(4) that *'if a journalist invades an individual's privacy, it is immaterial whether the invasion of privacy breaches the standards or the code of practice to which the journalist is subject'*, would allow significant scope for clear cases involving privacy harms not to be addressed by the statutory tort.

³ Parliament of New South Wales, Legislative Council, Standing Committee on Law and Justice, *Remedies for the Serious Invasion of Privacy in New South Wales*, Report No 57 (2016).

⁴ *Ibid*, Recommendation 3.

⁵ *Ibid*, Recommendation 4.

⁶ South Australian Law Reform Institute, *A Statutory Tort for Invasion of Privacy*, Final Report 4 (2016) Recommendations 1-2.

⁷ See discussion in Attorney-General's Department, *Privacy Act Review Report* (2022), [27.4] (pp 285-6).

26. For example, the exemption would likely exclude civil liability under the statutory tort for any privacy invasive practices engaged in by media, including besieging by paparazzi, surveillance and phone hacking. That media outlets sometimes engage in unethical practices is starkly exemplified by the phone hacking scandal in the UK. In the UK, journalists, managers and editors of a number of national newspapers had instructed private investigators and others to engage in widespread, institutionalised and longstanding phone hacking to gain information that was then published in their newspapers. The victims targeted included both prominent individuals and other persons of interest. When this scandal broke in 2011, the UK set up an inquiry into press ethics (the Leveson Inquiry) which concluded that civil liability, including via media torts, was justified in these cases⁸ – and there have been a number of decisions awarding damages since that report.⁹
27. The exemption would also have the effect that many other privacy invasions involving media, which have been fundamental to the development of the misuse of private information tort in the UK,¹⁰ could not be pursued under the new statutory tort in Australia.
28. According to the Explanatory Memorandum, *‘[t]he exemption recognises the important and beneficial role of journalism to a free and democratic society and that the prospect of litigation could have a chilling effect on public interest reporting’*.¹¹ We agree that journalists, and the media more broadly, have an important function in democratic societies. Their activities often raise and discuss issues of public concern, bring necessary scrutiny to government and other matters of public interest, and contribute to the proper functioning of our institutions and society generally. The importance of the media is recognised in international law through human rights guarantees of freedom of expression and freedom of the media.
29. However, the concern that a statutory privacy tort without a journalism exemption would have the potential to stifle media expression lacks force. Legitimate interests of the media are appropriately protected through other mechanisms in the tort. When developing the tort, the ALRC was at pains to limit its scope. Indeed, it could be argued that the design of the ALRC cause of action leans on the side of protecting potential defendants. Apart from other defences available to defendants, the cause of action imposes a ‘seriousness threshold’ that operates in addition to the public interest balancing test, a construction which the ALRC acknowledges was intended to *‘further ensure the new tort does not unduly burden competing interests such as*

⁸ *Report into the Culture, Practices and Ethics of the Press* (Leveson Inquiry Report) (November 2012).

⁹ E.g. *Gulati v MGN Ltd* [2015] EWHC 1482 (Ch); *Representative Claimants v MGN* [2015] EWCA Civ 129; *Duke of Sussex v MGN Limited* [2023] EWHC 3217 (Ch).

¹⁰ *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22; *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB); *Murray v Express Newspapers Plc* [2008] EWCA Civ 446; *HRH the Duchess of Sussex v Associated Newspapers Ltd* [2021] EWCA Civ 1810; *PJS v News Group Newspapers Ltd* [2016] UKSC 26; *Bloomberg LP v ZXC* [2022] UKSC 5.

¹¹ Explanatory Memorandum to the Privacy and Other Legislation Amendment Bill 2024, p 93.

freedom of speech'.¹² This was recognised in the Privacy Act Review Report, which noted that the '[ALRC] model slightly preferences other public interests over the public interest in privacy as the test requires that privacy outweigh other interests'.¹³

30. If the concern of the exemption was to avoid 'a chilling effect on public interest reporting', as stated in the Explanatory Memorandum, then the exemption is demonstrably too wide. The journalism exemption goes much further than is necessary for the protection of public interest reporting. There is no mention of a public interest test in the exemption. Not all journalism serves the public interest, as shown for instance by the UK phone hacking cases.

d. The exemption is unprincipled

31. Journalists should not be above the general laws that protect against privacy harms. In the words of the Rt Hon Lord Justice Leveson in the phone hacking inquiry report referred to earlier, '*[s]ome of the press's most important functions are to inform, educate and entertain and, when doing so, to be irreverent, unruly and opinionated*':

*But that does not mean that it is beyond challenge. Neither does it mean that the price of press freedom should be paid by those who suffer, unfairly and egregiously, at the hands of the press and have no sufficient mechanism for obtaining redress. There is no organised profession, trade or industry in which the serious failings of the few are overlooked because of the good done by the many. Indeed, the press would be the very first to expose such practices, to challenge and campaign in support of those whose legitimate rights and interests are being ignored and who are left with no real recourse.*¹⁴

32. Nor should they be above human rights standards. International human rights texts, to which Australia is a party, such as the International Covenant on Civil and Political Rights (1966), protect both privacy and freedom of expression. It is an important principle of international human rights law that neither privacy nor freedom of expression enjoy absolute protection or priority over the other: rather, rights and interests need to be balanced.
33. The exemption contradicts this principle because it explicitly elevates freedom of journalistic expression to a trump card. As made clear in cl 15(4), the exemption would allow individual journalists *carte blanche* to decide for themselves where to set the boundaries of any potentially privacy-invasive forms of journalism. In short, its purpose and likely effect would be to diminish journalistic accountability.

¹² Australian Law Reform Commission (ALRC), *Serious Invasions of Privacy in the Digital Era*, Report No 123 (2014), [8.15].

¹³ Attorney-General's Department, *Privacy Act Review Report*, [27.4] (p 286).

¹⁴ *Report into the Culture, Practices and Ethics of the Press*, Executive Summary, [10] (p 5).

34. The International Covenant on Civil and Political Rights (ICCPR) is cited in the Preamble to the *Privacy Act 1988* (Cth), which goes on to state that:

AND WHEREAS, by that Covenant, Australia has undertaken to adopt such legislative measures as may be necessary to give effect to the right of persons not to be subjected to arbitrary or unlawful interferences with their privacy, family, home or correspondence.

35. The United Nations' Human Rights Committee, in General Comment 16 on art 17 ICCPR, states that '*[t]he introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.*'¹⁵

36. We submit that the journalism exemption falls short of that standard.

37. We further submit that the journalism exemption also cannot be reconciled with the objects of the Privacy Act, in particular the newly introduced objects –

(a) to promote the protection of the privacy of individuals with respect to their personal information; and
(aa) to recognise the public interest in protecting privacy.

e. There is no international equivalent for a journalism exemption

38. The journalism exemption has no counterpart in the law of other common law jurisdictions. Neither the tort of misuse of private information in the UK, nor the New Zealand torts of wrongful disclosure of private information and invasion into seclusion contain such a limitation. The same applies to the Canadian statutory torts and the common law torts in the provinces that do not have a statutory tort.

39. All these torts rely on the protection of legitimate media interests through public interest defences. There is no reason why journalists in Australia require stronger protections.

V. Conclusion

¹⁵ Office of the High Commissioner for Human Rights, CCPR General Comment No. 16: Article 17 (Right to Privacy): The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, 32nd session of the Human Rights Committee (8 April 1988), [4].

40. In conclusion, the journalism exemption should be abandoned and removed from the Bill.