# Senate Legal and Constitutional Affairs Legislation Committee

# Privacy and Other Legislation Amendment Bill 2024

# Attorney-General's Department

**Hearing date:** 22 October 2024

**Hansard page:** 62

**David Shoebridge asked the following question:**

Senator SHOEBRIDGE: Perhaps this might throw some light on why we have reform that excludes any impact on a regulated entity. Who amongst you has seen the ACIL Allen report on privacy? Who amongst the witnesses here has seen it?
Ms Fitch: Yes, I have.
Senator SHOEBRIDGE: Why isn't it public?
Ms Fitch: It was something that was prepared primarily for the purposes of informing government decision-making. The government has been clear all along the way that it is seeking to be very careful in calibrating reforms to strike the right balance between proportionate impact on business and an upgrade in protection of privacy. That's primarily what I've got to say about that.
Senator SHOEBRIDGE: But why can't the parliament see it in order to better understand the ambition or not and the impact of these changes? Why isn't it public?
Ms Moran: I think what Ms Fitch has said is that it was one input into government decision-making processes around the response to the Privacy Act review and then how the government would decide to take these things forward. So it's being considered in that context.
Senator SHOEBRIDGE: Perhaps I didn't explain my question clearly. Why hasn't it been made public? The fact that you relied upon it and it was useful is a compelling reason to make it public, not to hide it. Why isn't it public?
Ms Moran: We can take the notice and come back to you.
Senator SHOEBRIDGE: Whose report was it? Was it a Treasury report or was it a report for your department? Whose report is it?
Ms Moran: It was conducted under a consultation arrangement contract with the Attorney-General's Department.
Senator SHOEBRIDGE: Was it in consultation with Treasury? Was it provided to Treasury? Did Treasury have input into it?
Ms Moran: We had consultations with Treasury along the way. It was an independent report by the consultant.
Senator SHOEBRIDGE: Who made the decision not to publish it? Was it you, Ms Fitch?
Ms Moran: I think we have not given evidence to say it should be taken one way or another. It is under consideration by the government as part of the decision-making processes the government undertakes.
Senator SHOEBRIDGE: Could you table a copy of it now, please?
Ms Moran: We don't have a copy.
Senator SHOEBRIDGE: Can you provide a copy to the committee?
Ms Moran: We can take that on notice.
Senator SHOEBRIDGE: Has it been published?
Ms Moran: Not that I'm aware of.
Senator SHOEBRIDGE: When was it drafted? When was it provided to you?

Ms Moran: To the best of my recollection, it was finalised in June 2024.
Senator SHOEBRIDGE: There's been a decision at least not to publish it to date. Who made the decision not to publish it to date, because there have been multiple requests from third parties, from stakeholder groups, for it to be published. Who has made the decision to date not to publish it? Was it you, Ms Fitch?
Ms Fitch: I have been the decision-maker in one relevant freedom-of-information request at first instance, and that was made on a range of grounds, including what I deemed to be valid exemptions under the Freedom of Information Act.
Senator SHOEBRIDGE: Could you provide a copy of your decision on that FOI to the committee?
Ms Moran: Decisions often are not made publicly available in terms of disclosure log obligations. We will take that on notice and see if there is something we can provide to you.

**The response to the question is as follows:**

1. Why hasn't the ACIL Allen Report been made public?

The Cost Benefit Analysis undertaken by ACIL Allen was commissioned for the purpose of informing Government decision-making processes about the impact of potential reforms, the release of which could, or might reasonably be expected to, disclose the deliberations of the Cabinet. Those processes are still underway. Standard government processes provide for an impact analysis, and accompanying assessment, to be published on the Office of Impact Analysis website when a final decision has been taken and announced.

2. Can you provide a copy of the ACIL Allen Report to the committee?

Noting the reasons provided above, the department is unable to provide a copy of the report.

3. Could you provide a copy of your FOI decision to the Committee?

A copy of the decision letter, with personal information appropriately redacted, is attached.

Australian Government

Attorney-General's Department

Our ref: FOI24/457; CM24/27161

17 October 2024

[redacted]

By email: [redacted]

Dear [redacted]

**Freedom of Information Request FOI24/457 – Decision letter**

The purpose of this letter is to give you a decision about your request for access to documents under the *Freedom of Information Act 1982* (the FOI Act) which you submitted to the Attorney-General's Department (the department).

**Your request**

On 17 September 2024, you requested access to:

> *… the report created by ACIL Allen on the impact of bringing small businesses under the Privacy Act.*

On 8 October 2024, the department acknowledged your request.

A decision in relation to your request is due on 17 October 2024.

**My decision**

I am an officer authorised under section 23(1) of the FOI Act to make decisions in relation to freedom of information requests made to the department.

I have identified one document that falls within the scope of your request. I did this by making inquiries of staff likely to be able to identify relevant documents and arranging for comprehensive searches of relevant departmental electronic and hard copy holdings.

In making my decision regarding access to the relevant document, I have taken the following material into account:

- the terms of your request
- the content of the document identified as within scope of your request
- the provisions of the FOI Act, and
- the Guidelines issued by the Australian Information Commissioner under s 93A of the FOI Act (the Guidelines).

I have decided to refuse access in full to one document on the basis that the material it contains is variously exempt pursuant to s 34(1)(a), s 47C and s 47E(d) of the FOI Act.

**Additional information**

Your review rights under the FOI Act are set out at **Attachment A** to this letter.

The statement of reasons at **Attachment B** sets out the reasons for my decision to refuse access to material to which you have requested access.

**Questions about this decision**

If you wish to discuss this decision, the FOI case officer for this matter is [redacted] who can be reached on (02) 6141 6666 or by email to foi@ag.gov.au.

Yours sincerely

[redacted]

Catherine Fitch
Assistant Secretary
Integrity Frameworks Division

**Attachments**
Attachment A: Review rights
Attachment B: Statement of reasons

**Attachment A – Your review rights**

If you disagree with my decision, you may ask for an internal review or Information Commissioner review. We encourage you to seek internal review as a first step as it may provide a more rapid resolution of your concerns.

***Internal review***

You may apply for an internal review of my decision within 30 days of receiving this letter. Your request for internal review must be in writing, and should provide reasons why you believe the review is necessary. You may apply by emailing foi@ag.gov.au or by post to:

Director, Freedom of Information and Privacy Section
Office of Corporate Counsel
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

Another officer will make a new decision on your request within 30 days of receiving your request for internal review. If you are unhappy with the internal review decision, you may ask for an information Commissioner review.

***Information Commissioner review***

Information Commissioner review requests must be submitted within 60 days of receiving this letter. Your request should include your contact details, a copy of my decision, and the reasons why you disagree with my decision. You can apply in one of the following ways:

**Online**: https://webform.oaic.gov.au/prod?entitytype=ICRequest&layoutcode=ICRequestWF
**Email**: foidr@oaic.gov.au
**Mail**: Director of FOI Dispute Resolution, GPO Box 5288, Sydney NSW 2001.

More information about Information Commissioner review is available at:
https://www.oaic.gov.au/freedom-of-information/your-freedom-of-information-rights/freedom-of-information-reviews/information-commissioner-review

***FOI Complaints***

If you are concerned about how we handled your FOI request, please let us know what we could have done better, as we may be able to rectify the situation. If you are not satisfied with our response, you can make a complaint to the Information Commissioner. Your complaint must be in writing, and can be lodged in one of the following ways:

**Online**: https://webform.oaic.gov.au/prod?entitytype=Complaint&layoutcode=FOIComplaintWF
**Email**: foidr@oaic.gov.au
**Mail**: Director of FOI Dispute Resolution, GPO Box 5288, Sydney NSW 2001.

More information about Freedom of Information complaints is available at:
https://www.oaic.gov.au/freedom-of-information/your-freedom-of-information-rights/freedom-of-information-complaints

**Attachment B - Statement of reasons - FOI24/457**

This document provides information about the reasons I have decided not to disclose certain material to you in response to your request for documents under the *Freedom of Information Act 1982* (FOI Act).

**Exemptions**

An agency or minister is not required to give access to a document or part of a document that is exempt from disclosure under Division 2 of Part IV of the FOI Act. I consider the document in scope for your request is exempt under section 34 of the FOI Act (Cabinet documents).

This exemption is not subject to an overriding public interest test. Accordingly, where a document meets the criteria to establish a particular exemption, it is exempt and the decision-maker is not required to weigh competing public interests to determine if the document should be released.

Brief information about the exemption applied when making a decision about disclosure of the document to which you have requested access is set out below. Additional information about this exemption can be obtained from the Guidelines available at: https://www.oaic.gov.au/freedom-of-information/foi-guidelines/part-5-exemptions.

***Section 34: Cabinet documents***

Section 34(1) of the FOI Act states that a document is an exempt document if:

*(a) both of the following are satisfied:*
  *(i) it has been submitted to the Cabinet for its consideration, or is or was proposed by a Minister to be so submitted;*
  *(ii) it was brought into existence for the dominant purpose of submission for consideration by the Cabinet; or*
*(b) it is an official record of the Cabinet; or*
*(c) it was brought into existence for the dominant purpose of briefing a Minister on a document to which paragraph (a) applies; or*
*(d) it is a draft of a document to which paragraph (a), (b) or (c) applies.*

I have decided to apply ss 34(1)(a) to the document for your request. My reasons for applying this exemption have been set out below**.**

*Section 34(1)(a)*

I have had regard to the particular context and contents of the document for your request and I have also received advice from other officers with responsibility for matters to which the document relates. Based on this information, I am satisfied that the material in the relevant document for your request was:

- submitted to the Cabinet for its consideration, or was proposed to be so submitted; and

- was brought into existence for the dominant purpose of submission for consideration by the Cabinet.

The cost benefit analysis prepared by ACIL Allen was commissioned for the purpose of informing Government decision making about the impact of potential reforms.

**Public interest conditional exemptions**

An agency or minister can refuse access to a document or part of a document that is conditionally exempt from disclosure under Division 3 of Part IV of the FOI Act. Documents for your request which are conditionally exempt under Division 3 relate to the following categories:

- deliberative processes (s 47C)
- certain operations of agencies (s 47E)

Brief information about each of the conditional exemptions applied when making my decision about disclosure of each of the documents to which you have requested access is set out below. Additional information about each of these conditional exemptions can be obtained from the Guidelines available at: https://www.oaic.gov.au/freedom-of-information/foi-guidelines/part-6-conditional-exemptions.

Where a document is assessed as conditionally exempt, it is only exempt from disclosure if disclosure would, on balance, be contrary to the public interest. The public interest test is weighted in favour of giving access to documents so that the public interest in disclosure remains at the forefront of decision making.

A single public interest test applies to each of the conditional exemptions. This public interest test includes certain factors that *must* be taken into account where relevant, and other factors which *must not* be taken into account. My reasoning in regard to the public interest is set out under the heading '*Section 11A(5): Public interest test*' below.

***Section 47C: Public interest conditional exemption - deliberative processes***

Section 47C of the FOI Act provides that a document is conditionally exempt if its disclosure under this Act would disclose matter (*deliberative matter*) in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency.

In applying this exemption, paragraph 6.55 of the Guidelines provide that:

> *The deliberative processes exemption differs from other conditional exemptions in that no type of harm is required to result from disclosure. The only consideration is whether the document includes content of a specific type, namely deliberative matter.*

I am satisfied that the relevant material is not purely factual and is deliberative matter within the meaning of s 47C(1), being in the nature of and relating to opinion, advice and recommendations.

The deliberative matter in question was created for the purposes of exploring the potential impacts, specifically the costs and benefits, associated with implementing potential reforms to the *Privacy Act 1988*. This document was prepared in the course of informing advice to Government on privacy

reform and squarely reflects the deliberative processes involved in the functions of both the Attorney-General's Department and the Minister.

Accordingly, I am satisfied that this material is conditionally exempt under s 47C(1) of the FOI Act. I have turned my mind to whether disclosure of the information would be contrary to the public interest and have included my reasoning in this regard below under the heading '*Section 11A(5): Public interest test*'.

***Section 47E: Public interest conditional exemption - certain operations of agencies***

Section 47E of the FOI Act provides that a document is conditionally exempt if its disclosure would, or could reasonably be expected to, do any of the following:

*(a) prejudice the effectiveness of procedures or methods for the conduct of tests, examinations or audits by an agency;*
*(b) prejudice the attainment of the objects of particular tests, examinations or audits conducted or to be conducted by an agency;*
*(c) have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or by an agency;*
*(d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.*

I am satisfied that s 47E(d) applies to the relevant material for your request.

Material in the document in the scope of your request contains and reflects information shared between various stakeholders and the consultant. Disclosure of such information could reasonably be expected to have a substantial adverse effect on the department's productive and open working relationships with relevant and similar stakeholders. The document does not draw definitive conclusions, and its disclosure may lead stakeholders to make incorrect assumptions about proposed reforms or the Government's position on them, and thereby influence their future assessment of impacts. This could in turn prejudice the quality of the department's future advice on the costs and benefits of reform, including by impacting the department's ability to conduct fresh consultation and analysis with relevant stakeholders unencumbered by previous processes, as is likely to be necessary in advising Government on the impacts of potential future reform. Disclosure of such information could thereby reasonably be expected to have a substantial adverse effect on the proper and efficient management of operations of the department.

Accordingly, I am satisfied that this material is conditionally exempt under s 47E(d) of the FOI Act. I have turned my mind to whether disclosure of the information would be contrary to the public interest and have included my reasoning in this regard below under the header '*Section 11A(5): Public interest test*'.

**Section 11A(5): Public interest test**

Access to a conditionally exempt document must generally be given unless doing so would be contrary to the public interest. The Guidelines issued by the OAIC provide at paragraph 6.224 that the public interest test is considered to be:

- *something that is of serious concern or benefit to the public, not merely of individual interest,*
- *not something of interest to the public, but in the interest of the public,*

- *not a static concept, where it lies in a particular matter will often depend on a balancing of interests,*
- *necessarily broad and non-specific, and*
- *related to matters of common concern or relevance to all members of the public, or a substantial section of the public.*

In deciding whether to disclose conditionally exempt material, I have considered the factors favouring access set out in s 11B(3) of the FOI Act. I have not taken into account the irrelevant factors listed under s 11B(4) of the FOI Act.

Of the factors favouring disclosure, I consider that release of the conditionally exempt material identified for your request would promote the objects of the FOI Act, including by:

- informing the community of the Government's operations, and
- enhancing the scrutiny of government decision making.

The FOI Act does not list any specific factors weighing against disclosure. However, I have considered the non-exhaustive list of factors against disclosure in the Guidelines as well as the particular circumstances relevant to the conditionally exempt material.

I consider the release of the conditionally exempt material could reasonably be expected to prejudice:

- the Attorney-General's Department's ability to maintain effective stakeholder relationships,
- the Attorney-General's Department's ability to obtain similar (robust and meaningful) information in the future for the purposes of privacy reform, and
- the proper and efficient operation of the relevant function of the Attorney-General's Department.

On balance, I consider the factors against disclosure outweigh the factors favouring access and that providing access to the conditionally exempt material identified for your request would be contrary to the public interest.

# Senate Legal and Constitutional Affairs Legislation Committee

## Attorney-General's Department

**Hearing date:** 22 October 2024
**Hansard page:** Pg 63

**David Shoebridge asked the following question:**

Senator SHOEBRIDGE: I would ask to take notice a review of Emeritus Professor McDonald's evidence and her submission, particularly clauses 73 and 74 of the proposed serious invasions of privacy. She seemed to have a number of quite credible critiques of the current drafting. Did you have any quick response to Professor McDonald's and also Professor Rolph's submission? If you haven't, you could take it on notice.
Ms Moran: We were listening but we were also on the move, so I'm looking down to my colleagues to see if there are any immediate responses.
Ms Fitch: We will come back to you further on notice but we are aware that professors McDonald and Rolph said the tort largely reflected the ALRC model with a few key departures. I suspect that is what you're referring to. There are some conversations which we had with civil litigation experts and so on which led to the approach that was ultimately reflected in the bill in how the public interest balancing test is represented in the bill, but we can come back to you in more detail about that.
Senator SHOEBRIDGE: I think Professor McDonald had some very real concerns about putting in place some kind of evidentiary onus, limiting it purely to questions of evidence when she thought there were equally questions of law and the potentially very limited way in which 73 operated. If you could respond to her evidence on notice, I would appreciate that.
Ms Moran: We can do that.

**The response to the question is as follows:**

**<u>Clause 7(3)</u>**

The drafting of clause 7(3) was intended to give effect to the approach set out in recommendation 9-3 in the ALRC Report 123. The 'public interest balancing' exercise as set out in subclause 7(3) is intended to allow judicial consideration of relevant countervailing public interests. It requires a plaintiff to satisfy the court that the public interest in their privacy outweighs any countervailing public interests in the invasion of privacy raised by the defendant. It provides that the defendant has the burden of adducing evidence that there is a countervailing public interest for the court to consider. It recognises that the public interest balancing element of the tort will not need to be satisfied in all cases; there may be matters in which competing public interests do not exist and the plaintiff should not need to prove the non-existence of public interests that have not been raised.

The suggested redraft of Clause 7(3) proposed by Professors McDonald and Rolph removes the evidential burden from the defendant and requires the court to consider any/all countervailing public interests in determining whether the public interest balancing element of the cause of action is made out. The department is now considering how the proposed formulation in the suggested redraft would operate procedurally to ensure the plaintiff is

aware of the case it must meet and the court is properly informed of the matters it must consider.

**Clause 7(4)**

The non-exhaustive list of public interests set out in subclause 7(4) represent matters in relation to which the defendant *may* adduce evidence. The suggested redraft of clause 7(4) proposed by Professors McDonald and Rolph would remove the evidential burden in relation to the public interest balancing element from the defendant. It would instead be provided as matters of public interest *which the court may consider* when determining the public interest balancing element of the tort. The department will consider the appropriateness of subclause 7(4) in light of the proposal to amend subclause 7(3).

Subclause 7(4)(a) refers to the public interest in freedom of expression and subclause 7(4)(b) refers to freedom of the media. Professors McDonald and Rolph have proposed that these subclauses be amended to include reference to artistic expression as a form of freedom of expression (7(4)(a)) and to add the words 'to responsibly investigate and report matters or public concern and importance' after 'freedom of the media' (7(4)(b). These amendments could be made but arguably are not technically necessary. The Explanatory Memorandum to the Bill clarifies that freedom of expression includes (among other things) artistic expression and that the public interest in the freedom of the media pertains to the responsible investigation and reporting of matters of public concern and importance.

# Senate Legal and Constitutional Affairs Legislation Committee

## Attorney-General's Department

**Hearing date:** 22 October 2024
**Hansard page:** 65 & 68

**Paul Scarr asked the following question:**

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Senator SCARR: Thank you; I just wanted to square that away. Just some quick and easy low-hanging fruit: ABC and SBS both raised concerns that, as publicly owned broadcasting organisations, they might not be considered media organisations for the purposes of the act. The mere fact that they raised the concern would indicate to me that maybe the drafting needs to be tweaked. Do you have any response to that?
Ms Fitch: Was that specifically in the context of the offence, or more broadly?
Ms Jay: I think that was in relation to section 80KA; is that right?
Senator SCARR: Yes, it was that section. Can you have a look at that?
Ms Moran: It came up in the context of the NACC legislation, from memory, so it's an issue that the
department is aware of. I don't think we contemplated it in this context, but we heard the evidence today and can have a look at that for you.

Senator SCARR: Thank you. We heard from our friend the professor, who was involved in the Australian Law Reform Commission process and gave very helpful evidence. In her submission she talked about how clause 7(3) and (4) of the tort have evolved from the Australian Law Reform Commission proposal. How did that occur?
What was the thinking behind that evolution? Why the tweaking in wording? I note you referred to getting evidence from civil litigation experts. To what extent did that justify a change in the wording?
Ms Fitch: It's a reasonably technical question, and I think we've agreed to give some more information in response to Professor McDonald's evidence on notice. Essentially, I think it largely boils down to who is best placed in a civil litigation context to identify public interests which might apply. We thought, in the course of working with drafters and others on how to construct it, that there might be instances where somebody seeking to
defend an action is better placed to identify relevant public interest factors which a court should consider.
Senator SCARR: You've taken that on notice, so could you come back to us on that. Also, at the same time as you're looking at the professor's submission—the professor gave quite strong evidence in relation to querying the journalist exemption and the law enforcement agency exemption and, again, gave evidence to the effect that the Australian Law Reform Commission dealt with that in a somewhat different way. I'd be interested to know the reasoning underpinning the way that the bill has been drafted. Is it possible for you to take that on notice and provide us with a more fulsome response?
Ms Fitch: It is. I'd also add that we've been watching the evidence given today and note that a diversity of views have been expressed on those two issues. But, yes, we'll take that on notice for you.

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Senator SCARR: Understood, thank you. I know there are philosophical differences, in terms of competing interests, but I'm particularly interested for you to take this on notice, in response to the Australia's Right to Know coalition. They made a number of recommendations where they referred to technical matters in relation to the definition of 'journalistic material', in relation to other limitations—'protection to a publisher who retains a journalist as an independent contractor', for example, and also in relation to the concerns they raise about the
protection of sources. This is on pages 5, 6 and 7 of their submission. I consider them really technical issues. Could you take those on notice, to make sure the ambit of the exemption works as intended. Similarly, could you take on notice what I'd, again, refer to as the technical recommendations of the Law Council of Australia. It doesn't have to be War and Peace. I'm just interested to know your consideration in relation to the drafting process—you could well have considered these matters—in
particular, recommendations 2 to 17. If you've got short responses to them, that would then assist me to close out those issues in terms of providing my comments in relation to the bill. Lastly, the AMA, the Australian Medical Association, made a submission. Obviously we care about the health of all Australians, and a lot of the topics they
covered were along the lines of disclosure of, say, my father's and grandfather's health history, with a view to assisting in the provision of health services to me as a patient. Again, I'm not looking for War and Peace, but I'm looking for how the bill responds, from your perspective, to those issues.
Ms Moran: We can do that.

**The response to the question is as follows:**

Please see the table at **Attachment A**.

**ATTACHMENT A**

Senate Legal and Constitutional Affairs Legislation Committee - Privacy and Other Legislation Amendment Bill 2024

| Question | AGD response |
|---|---|
| **Submissions of ABC and SBS – exclusion of only commercial broadcasters for the purposes of emergency declarations** | The Bill currently prohibits media organisations from being specified in an emergency declaration or an eligible data breach declaration as entities that may collect, use or disclose information, or have information disclosed to them, under a declaration. This prohibition is currently expressed to only include commercial broadcasters due to the way 'media organisations' is defined under the *Privacy Act 1988*. It was not intentional to treat the national broadcasters differently from commercial broadcasters for the purposes of the relevant declaration provisions in the Bill. |
| **Submission of Emeritus Professor Barbara McDonald and Professor David Rolph - schedule 2, subclauses 7(3) and 7(4)** | Refer to the response to Question on Notice 2547. |
| **Submission of Emeritus Professor Barbara McDonald and Professor David Rolph - schedule 2, clauses 15 and 16** | Exemption - Journalists<br>This exemption recognises the important and beneficial role of journalism in a free and democratic society; it is intended to mitigate the risk that the mere prospect of litigation would have a chilling effect on reporting. The exemption would apply where an invasion of privacy is by a journalist, their employer, or certain persons assisting a journalist, and involves the collection, preparation or publication of journalistic material. Conduct that does not meet the requirements of the exemption could potentially still be subject to the tort where the elements were established – including that the privacy invasion was serious, the plaintiff had a reasonable expectation of privacy, and the defendant's conduct was intentional or reckless, as well as the public interest balancing element.<br>Exemption - Enforcement bodies<br>This exemption ensures that liability will not arise for law enforcement activities. This will mean that these entities are not unduly restricted in carrying out their functions which may need to be privacy invasive. An invasion of privacy by an enforcement body is exempt only to the extent that an enforcement body reasonably believes it is reasonably necessary for one or more of the enforcement-related activities it is undertaking. |
| **Submission of Australia's Right to Know (ATRK) coalition - the definition of journalistic material** | The definition of journalistic material in subclause 15(3) is intended to be 'platform neutral'; it covers those materials considered relevant for the additional protection provided by a journalism exemption - i.e. material that has the character of news, current affairs or a documentary, or consists of commentary, opinion on, or analysis of news, current affairs or a documentary. Material, activity or expression that does not meet the requirements of the exemption could potentially still be subject to the tort where the elements were established – including that the privacy invasion was serious, the plaintiff had a reasonable expectation of privacy, the defendant's conduct was intentional or reckless, and if the public interest balancing test were met. |
| **Submission of ARTK coalition - application of the journalism exemption to sources** | This exemption was not intended to extend to journalists' sources, and there are policy reasons for taking this approach. Whistleblower laws are intended to address concerns about liability in certain public interest contexts in a consistent manner that extends beyond specific causes of action. Every Australian jurisdiction also has 'journalist shield' laws that prevent journalists from being required to disclose the identity of sources. |
| **Submission of ARTK coalition - application of journalism exemption to publishers who retain a journalist as an independent contractor** | The existing exemption for journalists extends to journalists' employers. It is not clear the extent to which extending its application more broadly would satisfy the policy intent of protecting the beneficial role of journalism. |
| **Law Council of Australia – recommendation 2**<br>Amend proposed paragraph 2A(aa) (inserted by Item 1 of Schedule 1 to the Bill) to expressly refer to protecting the privacy of individuals, consistently with proposed paragraph 2A(a). | Subclause 2A(aa) is intended to recognise the public interest in protecting privacy. Including reference to the privacy 'of individuals' is not required as the privacy protections in the Privacy Act already apply to natural persons. The Explanatory Memorandum to the Bill also makes it clear that subclause 2A(aa) is intended to recognise the broader collective public benefits of strong privacy protections for individuals. |
| **Law Council of Australia – recommendation 3**<br>Amend Part 2 of Schedule 1 to the Bill to empower the Information Commissioner to advise the Minister of the necessity for an APP code (or temporary code), and so that the Minister is required to consider this request prior to issuing a direction under proposed sections 26GA and 26GB of the Privacy Act. | The Bill empowers the Information Commissioner to make APP codes on the direction of the Minister. The Information Commissioner already has advice-related functions as set out in section 28B of the Privacy Act which may be performed by the Information Commissioner on request or on the Commissioner's own initiative and include:<br>Subsection (1)(a) providing advice to a Minister about any matter relevant to the operation of the Privacy Act, and<br>Subsection (1)(c) providing recommendations to the Minister in relation to any matter concerning the need for, or the desirability of, legislative or administrative action in the interests of the privacy of individuals. |
| **Law Council of Australia – recommendation 4**<br>The breadth of the exclusion of health service providers under Item 32 of Schedule 1 to the Bill, with respect to the COP Code, should be narrowed to exclude counselling services only, not health services more generally. | Proposed subclause 26GC(5)(a)(iii) excludes health service providers from the scope of entities bound by the Children's Online Privacy (COP) Code. Proposed subclause 26GC(5)(b) provides a mechanism for specified health service providers or types of health service providers to be bound by the COP Code. This is to ensure the COP Code is not inadvertently a barrier to providing essential services to children, and allows more detail about the scope of the COP Code to be determined through the code-making process. |
| **Law Council of Australia – recommendation 5**<br>The proposed definition of 'child' (inserted by Item 30 of Schedule 1 to the Bill) should be limited to the use of that term in the COP Code only, not in the Privacy Act more broadly. | The proposed definition of 'child' in the Bill will apply across the Privacy Act unless the contrary intention appears. The Law Council refers to the importance of respecting the agency of young people under 18 years and the issue of capacity to consent. Currently, the approach to capacity to consent under the Privacy Act is set out in Office of the Australian Information Commissioner (OAIC) guidance rather than in the legislation and specifies that an individual must have capacity to give consent. Proposal 16.2, which was agreed in principle in the Government Response to the Privacy Act Review Report would codify in the Act the principle that valid consent must be given with capacity. The proposed definition of child would not be determinative of capacity to consent where required under the Privacy Act. |

**ATTACHMENT A**

Senate Legal and Constitutional Affairs Legislation Committee - Privacy and Other Legislation Amendment Bill 2024

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| **Law Council of Australia – recommendation 6**<br>Part 6 of Schedule 1 to the Bill should be amended to add a limitation to existing subsection 5B(3) of the Privacy Act that confines the scope of the extraterritorial application of the Privacy Act, such as to 'personal information from a source in Australia' | Proposal 23.1 was agreed in principle in the Government Response to the Privacy Act Review Report (consult on an additional requirement in subsection 5B(3) to demonstrate an 'Australian link' that is focused on personal information being connected with Australia), and is being advanced in the context of the second tranche of reforms. |
| **Law Council of Australia – recommendation 7**<br>APP 8.2(a) and the Privacy Regulation 2013 (Cth) should be amended so as to reference some of the mechanisms that are widely used by APP entities to address Article 46 of the EU GDPR, such as Standard Contractual Clauses, as approved by the European Commission. | APP 8.1 requires entities to take such steps as are reasonable to ensure that an overseas recipient of personal information does not breach the APPs in relation to the information. APP 8.2 provides that APP 8.1 does not apply where certain circumstances are established. One such circumstance is where the entity reasonably believes that the recipient of the information is subject to a law or binding scheme that has the effect of protecting the information in a way that is at least substantially similar to the way in which the APPs protect the information and there are mechanisms that the individual can access to take action to enforce the protection of the law or binding scheme (APP 8.2(a)). Schedule 1, subclause 37 introduces a mechanism to enable countries and certification schemes to be prescribed as providing substantially similar protection to the APPs under APP 8.2(a). Entities may still make their own assessment about whether countries or schemes that are not prescribed meet this test for the purposes of APP 8.2(a). The Government has also agreed in principle to progress Proposal 23.3 of the Privacy Act Review to make standard contractual clauses available to APP entities for transferring personal information overseas. |
| **Law Council of Australia – recommendation 8**<br>Given the principles-based obligations in the Privacy Act, further clarity is needed as to the list of factors that will give rise to infringement notices as an enforcement tool under Part 8 of Schedule 1 to the Bill. | The infringement notice power in section 13K is limited to specified provisions. The Attorney-General's Department *Guide to Framing Commonwealth Offences* states that an infringement notice scheme is appropriate for 'relatively minor offences, where a high volume of contraventions is expected, and where a penalty must be imposed immediately to be effective' and 'an enforcement officer can easily make an assessment of guilt or innocence'. The specified provisions were selected to align with this guidance. The provisions selected are similarly proscriptive to provisions subject to infringement notice powers of other regulators including the ACCC, ASIC and ACMA. |
| **Law Council of Australia – recommendation 9**<br>Proposed section 13K (inserted by Part 8 of Schedule 1 to the Bill) should be amended to require, in the first instance, an OAIC notice that clearly outlines what is required to remedy the issue. | The infringement notice scheme would enable the Information Commissioner to issue infringement notices in relation to alleged minor contraventions of the Act. This would allow the Commissioner to ensure compliance with privacy obligations without the need for protracted litigation. |
| **Law Council of Australia – recommendation 10**<br>Sections 26WK and 26WL of the Privacy Act should be updated to address and align with the proposed provisions in Part 8 of Schedule 1 to the Bill to ensure that, together, they are facilitating a workable, consistent, and comprehensive compliance framework. | The notifiable data breaches scheme provisions included in the infringement notice scheme in clause 13K apply where an entity prepares a statement under section 26WK and that statement does not comply with subsection 26WK(3) (i.e. because it does not contain the information required to be in the statement). They do not apply to sections 26WK and 26WL more broadly. Broader reforms to the obligations and timeframes in sections 26WK and 26WL are being considered in the second tranche of reforms. |
| **Law Council of Australia – recommendation 11**<br>The terminology in Part 15 of Schedule 1 to the Bill should be aligned with Article 22 of the EU GDPR, which regulates 'a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her'. | Part 15 increases transparency about substantially automated decisions which significantly affect individuals' rights or interests. Entities will be required to include information in their privacy policy about the kinds of decisions and kinds of personal information used in these decisions. The use of the language 'rights or interests' is intended to have broad coverage. Rights do not have the same application in Australian law as in Europe which has more developed rights-based frameworks. Interests may include things that are not rights under the Australian law – for example the provision of benefits under an Act or denial of significant services or support. |
| **Law Council of Australia – recommendation 12**<br>It should be clarified whether Item 88 of Schedule 1 to the Bill, relating to automated decision making, is intended to apply to private sector entities and, if so, how private entities would apply the test in proposed APP 1.7 in circumstances where a series of decisions are made, some of which may include the use of computer programs and commercial-in-confidence information. | Clause 88 of Schedule 1 inserts new provisions into APP 1 that apply to APP entities. APP entities include non-exempt organisations, covering a range of private sector entities. The information required to be provided in privacy policies includes the kinds of personal information used, the kinds of decisions made solely by computer programs and the kinds of decisions substantially and directly involving a computer program. As currently outlined in OAIC guidance, a privacy policy is general in nature, and focuses on the entity's information handling practices. This level of detail is not expected to involve any commercial-in-confidence information. |
| **Law Council of Australia – recommendation 13**<br>Part 15 of Schedule 1 to the Bill should be amended to include a list of factors that must be considered by APP entities, prior to determining whether an automated decision may reasonably be expected to affect the rights or interests of an individual. | Clause 88 of Schedule 1 inserts APP 1.9(d) which provides a non-exhaustive list of examples of decisions that may affect the rights or interests of an individual. The Explanatory Memorandum further clarifies that whether a decision could be reasonably expected to significantly affect the rights or interests of an individual depends on the circumstances, for example whether the individual is experiencing vulnerability, but that the effect must be more than trivial, and must have the potential to significantly influence the circumstances of the individual concerned. |
| **Law Council of Australia – recommendation 14**<br>Part 15 of Schedule 1 to the Bill should be amended to provide for a right for individuals to request meaningful information about how | In its Response to the Privacy Act Review Report, the Government agreed to implement Proposal 19.3 of the Privacy Act Review. This proposal is proposed to be advanced in a further package of reforms, alongside other proposals to expand and introduce new individual rights. This would allow |

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| substantially automated decisions with 'legal or similarly significant effect' are made, consistent with Proposal 19.3 of the Privacy Act Review Report. | implementation of these reforms to be informed by the Government's work to develop guardrails for safe and responsible AI and a legal framework to support automated decision making, consistent with the principles recommended by the Robodebt Royal Commission. |
| **Law Council of Australia – recommendation 15**<br>Should Part 15 of Schedule 1 to the Bill pass, significant guidance must be developed by the OAIC to assist entities to understand—and meaningfully comply with—their disclosure obligations. | In its Response to the Privacy Act Review Report, the Government agreed to implement Proposal 19.2 of the Privacy Act Review, which includes a recommendation for OAIC Guidance to supplement legislative provisions. Making guidelines and promoting an understanding of the APPs are among the Information Commissioner's guidance-related functions under section 28 of the Privacy Act. Part 15 has a two-year transition period to allow entities sufficient time to evaluate their use of automated decision making and to consider if any action is required to meet the new requirements. |
| **Law Council of Australia – recommendation 16**<br>The provisions in Part 15 of Schedule 1 to the Bill that refer to 'substantially and directly related to making a decision' should be redrafted to ensure that they do not apply beyond what is intended. | The Explanatory Memorandum to the Bill clarifies that 'substantially' means where a computer program is a key factor in facilitating human decision making and that 'directly' means a direct connection with making the decision. It also provides illustrative examples of when the provisions in Part 15 of Schedule 1 would and would not apply. These provisions are not intended to apply to decisions involving a minor or inconsequential automated component. It is expected that the Information Commissioner will develop guidance on the new Part 15 requirements under their guidance-related functions in section 28 of the Privacy Act to assist entities to understand how to comply with the new obligations. |
| **Law Council of Australia – recommendation 17**<br>Schedule 2 to the Bill should be redrafted to:<br>1. expressly reference the ICCPR in paragraph 1(e);<br>2. provide guidance on the meaning of 'consent' for the purpose of a defence;<br>3. clarify the interaction between matters that are currently exempt from the Privacy Act by virtue of sections 7B and 7C; and<br>4. expand the journalist exemption in clause 15 to include organisations that are involved in the publication process. | In relation to the redrafting suggestions 1-3:<br>• The Explanatory Memorandum already makes clear that the international obligations the tort implements include Article 17 of the ICCPR.<br>• 'Consent' has deliberately not been defined more specifically in the Bill, as the interpretation is intended to draw on common law jurisprudence and to evolve in a context-specific manner as contemplated in ALRC Report 123.<br>• The exemptions in the main body of the Privacy Act have no application to the statutory tort. The Bill makes this clear in the current drafting, emphasised by the provision of separate exemptions specific to the tort, and clarified further by paragraph 6(3) of Schedule 2.<br>In relation to redrafting suggestion 4, a similar suggestion – to broaden the journalism exemption - was put forward by Australia's Right to Know coalition. Please see response above. |
| **Australian Medical Association submission** - potential liability under the tort for medical practitioners and researchers in relation to:<br>• Collecting family medical history without express consent<br>• Collecting reports from other specialists without express consent<br>• Disclosing health information to family members or authorities<br>• Raising concerns about colleagues<br>• Medical research using personal data | The tort already provides a number of safeguards to protect legitimate and necessary activities in the medical sector. The tort includes a public interest balancing element that requires a plaintiff to satisfy the court that the public interest in protecting their privacy outweighs any public interests the defendant may raise. The non-exhaustive list of public interests explicitly includes public health. The tort also includes a range of defences, including consent, and a necessity defence where the defendant reasonably believed that the invasion of privacy was reasonably necessary to prevent or lessen a serious threat to the life, health, or safety of a person. The model of the tort was deliberately crafted to ensure that privacy is balanced with other important public interests. This design of the tort should ensure that legitimate practices in the course of medical care or research do not attract liability under the tort. |