To: Senate Legal and Constitutional Affairs Legislation Committee

Via online submission only

08 October 2024

Submission on Privacy and Other Legislation Amendment Bill 2024

Dear Sir/Madam,

I write on behalf of the Free Speech Union of Australia to make a submission in respect of the 'Privacy and Other Legislation Amendment Bill 2024.'

The Free Speech Union of Australia is a non-partisan organization whose focus is on the protection of Free Speech in Australia. We are seriously concerned about certain aspects of the Bill, which have taken legitimate concerns about Privacy and converted them into censorship. There are two main areas of concern:

1. **Modification of the Criminal Code to deal with 'Doxxing'**

We recognise the importance of protecting people from the malicious dissemination of deeply personal information. Such an invasion can have a chilling effect on public discourse. This is a matter that should be addressed. The problem is that these provisions have a far wider net than what most people would consider to be 'Doxxing'. The legislation needs tailoring to address only the matters raised in the explanatory memorandum. The main reasonable concern seems to be people being required to 'such as temporarily or permanently mov[e] from an address that has been released'.[1] The main other harms such as 'physical threats, stalking, harassment' are already addressed by separate offences: they are already directly criminalised. There is no need to have a separate collateral approach for addressing them. As for identity theft, the issue lies elsewhere, namely the relative lack of online security in Australia compared to other nations.[2]

The provisions that purport to address 'Doxxing' are remarkably expansive in their breadth. They would seemingly cover misgendering, dead-naming, and even pointing out which societies or organisations Politicians frequent (e.g. where Dan Andrews plays golf or whether a given politician is a member of the Australian Club). It would even potentially criminalise someone saying in a private message '*I think so and so is gay, should I ask him out*', or perhaps '*I think so and so has medical condition X*', both of which amount to a regressive stigmatisation of different groups (same sex attracted people in one sense, disabled people in another). Such criminalisation is inappropriate in

[1] Explanatory Memorandum at Paragraph 515.
[2] This can be addressed by legislation that focusses on organisations such as banks.

a democratic society. The Criminal law should be slow to regulate the dissemination of personal information, given the Freedom of Expression issues that arise.

On the assumption that this is in error, we have enumerated the specific drafting issues[3] and how they should be remedied:

a. **Classes of Information covered:** The types of information covered are far too broad. Providing someone's email address is not going to cause significant harm, let alone the type of harm that should be criminalised. It is easy enough to filter spam. The same goes for all manner of electronic communications. Disseminating **electronic** addresses should not be criminalised in any way.
b. **Including Public Information:** The Bill uses the term 'personal information', rather than 'private information', which is an unduly broad test. The most appropriate approach would be to have a small and complete list of categories. We would expect that residential addresses would cover most doxxing, and possibly home phone numbers. Indecent images are already covered by existing law, as is harassment using a carriage service.[4]
c. **Failing to take into account the *extent* of the communication:** The extent of the distribution should be added as a factor. Private messages, e.g. over Whatsapp, Text Message, or Email should not be criminalised. Rather the concern is the widespread dissemination of the information.
d. **Disproportionate Penalty:** The penalty is disproportionate, with a maximum of ***seven* years** imprisonment provided. This should be amended. We would see one year as a **maximum** for any conceivable matter that would not be captured by existing offences.[5] Distributing information that **potentially** enables an offence should not have a far higher penalty than the offence itself. It is also incongruent with existing provisions on incitement, which has a lower criminal punishment for considerably greater involvement (i.e. intending that a specific offence be committed).[6]
e. **Inclusion of the word 'harassing':** The test should omit the word 'harassing', which is too broad for the offence in question. We also content the test should be focussed on creating a substantial risk of **physical** harm to an individual, which is the main legitimate concern with doxxing.
f. **Fault Elements:** We contend that **intention** in relation to substantial **physical** harm should be added as a fault element that the prosecution must prove. The present offence simply criminalises the disclosure, if it *may* have a particular effect. This is not an appropriate standard for a criminal offence. We further note that:

[3] These comments apply to both offences proposed in Schedule 3 of the Bill.
[4] See Sections 471.17 and 471.17A of the Criminal Code.
[5] We also would contend that two separate offences are unnecessary. There are a range of aggravating factors and these can be taken account of in sentencing, without splitting the offence into two.
[6] See Section 11.4 of the Criminal Code.

- Including **intended** harm as a fault element is an important safeguard, not only for Freedom of Expression, but also to protect people with certain disabilities that can make it harder for them to judge what information should or should not be disclosed.
- Despite what is claimed in the explanatory memorandum, the 'reasonable person' test cannot operate predictably in this context.[7] Community standards around information disclosure are vague and ever changing (in line with the rapidly changing digital opportunities that are available), as well as varying greatly across individuals and communities. It is very hard to make an objective assessment of whether the information should be disclosed. The use of a 'community standard' is thus inimical to the rule of law.

g. **Political actors:** The protection of politicians from accountability is also a serious concern. This undermines legitimate criticism and accountability measures. We would contend that this group should be excluded from the provisions, along with senior public officials (possibly defined by reference to a salary level).

Notably, the Bill provides other remedies for less serious instances of 'doxxing' under its 'statutory tort' in relation to Privacy. There is no need to have such an expansive provision in the Criminal Law.

2. The Statutory 'Privacy Tort'

We find the present formulation of this 'tort' to be highly concerning. There are no legal cost protections, so like defamation, this tort will only be available to the powerful. Nor are there any provisions that prevent it from being used as part of a Strategic Lawsuit against Public Participation (or SLAPPs).

We consider that Privacy and Free Speech have an important connection, but only if Privacy is implemented properly.[8] The Statutory Tort is Potemkin in nature for most people: it is simply not available to them in any practical sense. Privacy is not just for the elites. A two-tier privacy law is not appropriate.

We are also concerned that journalists are protected, but citizen journalists are not. The protection against claims should be applied to natural persons generally.

Given these concerns, we would ask that there be the following modifications made:

1. That claims may only be brought against corporate entities of a sufficient size or turnover (to stop NGO's and smaller organisations being targeted). Organisations with a non-profit status should be exempt.
2. There be appropriate costs protections be added to ensure that individuals are not prevented from bringing claims. The amount of damages in a privacy claim

[7] See Paragraph 496.
[8] Ironically, the Ministers Second Reading Speech asserts that the statutory tort 'reinforc[es] other fundamental rights and values, including freedom of expression'. As drafted, it does the opposite.

tends to be small in most cases, but this would make a claim uneconomic to bring. This may require a specialised small-claims process.

We would be pleased to appear before the Committee and answer any questions. Thank you for your consideration of our submission.

Yours sincerely,

Dr Reuben Kirkham, *Free Speech Union of Australia*