Supplementary Submission to the Senate Legal and Constitutional Affairs Legislation Committee in respect of its Inquiry into the *Privacy and Other Legislation Amendment Bill 2024*

Authors: Emeritus Professor Barbara McDonald, University of Sydney, formerly Commissioner leading the ALRC *Inquiry into Serious Invasions of Privacy in the Digital Era*, 2013-2014.

Professor David Rolph, University of Sydney, media law expert and formerly a member of the Advisory Committee, ALRC *Inquiry into Serious Invasions of Privacy in the Digital Era*, 2013-2014.

4 November 2024

Thank you for giving us the opportunity to speak to the Committee on 22 October. The Committee asked if we could respond to the submission of Australia's Right to Know Coalition and the Law Council of Australia, and to clarify our view on the process for the balancing of public interest. We also make some comments on the Australian Industry Group submission about employee records. Our submission is limited to Schedule 2 which would enact a cause of action in tort for serious invasion of privacy.

1. Response to the submission by Australia's Right to Know Coalition Submission 59

A journalism exemption

1.1 Our view diverges on a matter of fundamental principle from that of Australia's Right to Know Coalition. In our view, and as proposed by the ALRC in Report 123, the public interest in protecting privacy needs to be balanced against countervailing public interests, such as freedom of expression and freedom of the press. Rather than recognising and balancing the competing interests, Australia's Right to Know Coalition prefers one set of interests over the other by proposing a complete exemption from the proposed tort for journalists and related entities. We are not aware of any such journalism exemption elsewhere in relation to personal rights against invasions of privacy: not in the UK, not in New Zealand, not in Canada, not in European countries.

1.2 The balancing approach is consistent with the way in which the common law has developed to protect privacy in the United Kingdom and New Zealand. It also seems more consistent with Australia's international human rights obligations under the ICCPR, to which this tort is intended to give effect. A complete exemption for journalism provides no protection for privacy at all against media intrusion.

The extension of the journalism exemption to other publication entities

1.3 Australia's Right to Know Coalition's concern about the potential liability of printers [and the like] is, in our view, misconceived. The fault requirement for the proposed statutory tort of serious invasion of privacy is significantly different from the causes of action developed by courts in the UK and New Zealand. Liability can only be established if the defendant's conduct is intentional or reckless. Thus, a printer ordinarily could only be held liable for the statutory tort of serious invasion of privacy if the printer intentionally or recklessly invaded the plaintiff's privacy.

1.4 There is a misconception here about the similarity between the tort of defamation and the proposed statutory tort for serious invasion of privacy. A printer needs a defence of innocent dissemination to defamation because defamation is a tort of strict liability. Any person who voluntarily disseminates defamatory matter is a publisher for the purposes of defamation. The proposed tort is not a tort of strict liability.

1.5 However, for the avoidance of doubt and to avoid litigation to settle any uncertainty, if the exemption is to be retained, we would have no objection to confirming its application to printers and the like.

The public interest hurdle in cl 7(3) and 7(4)

1.6 Most significantly, Australia's Right to Know Coalition does not engage with the protection of media interests that is expressly contained in cl 7(3) and 7(4). These provisions are key to understanding how the proposed form of the cause of action would operate and how it is more protective of the media than Australian defamation law.

1.7 This hurdle specifically legislates recognition of the importance of countervailing public interests such as freedom of speech and the freedom of the media. If anything, it provides the legislative recognition that Australia's Right to Know Coalition says is lacking in Australian law. It is much more valuable to the media than a public interest *defence.*

1.8 In defamation law, the plaintiff is entitled to damages if the defendant does not establish or prove a defence. Many of those defences involved public interest in some form. Indeed, most states have now introduced a public interest *defence*, similar to that developed in the United Kingdom, to protect journalism on matters of legitimate public interest from defamation actions. By contrast, under the proposed tort, public interest if recognised up front: *the plaintiff is not entitled to succeed at all* unless his or her privacy interest *outweighs* any public interest. If anything, the privacy interest is therefore subservient to countervailing public interests.

No serious harm threshold

1.9 A 'serious harm' threshold for the statutory tort for serious invasion of privacy is unnecessary and inappropriate for the following reasons:

- 1.9.1 The tort already requires the court to be satisfied that the invasion of privacy is serious. By definition, this excludes non-serious invasions of privacy.

- 1.9.2 Australia's Right to Know Coalition overlooks the background which led to the introduction of the serious harm element into the cause of action in defamation in all Australian jurisdictions, except for the Northern Territory and Western Australia. The serious harm requirement was introduced because liability for defamation was seen to be too easy for a plaintiff to establish. Harm to reputation was previously *presumed* once defamatory publication was proved. The reform requiring proof of serious harm or likelihood of serious harm to reputation was particular to the tort of defamation and the way it has developed over eight centuries. It is inapposite to a statutory tort being developed from scratch. The purpose of the statutory tort for serious invasion of privacy is to recognise and fill a long-standing gap in the protection of dignitary interests at common law, most commonly leading to emotional distress. The common law was overly protective of reputation, at the expense of freedom of speech and freedom of the press but it was insufficiently protective of privacy. Indeed, there is no direct, general right to privacy at common law in Australia. Seeking to impose a serious harm threshold for privacy overlooks the fundamental difference between the way in which the common law has protected reputation (very highly) and privacy (rather more poorly).

- 1.9.3 Relatedly, Australia's Right to Know Coalition overlooks the fundamental difference between the tort of defamation and the proposed statutory tort for invasion of privacy in relation to the issue of fault. Defamation is a tort of strict liability. To establish liability, a plaintiff does not need to prove fault in relation to defamatory meaning, identification, publication and now serious harm. By contrast, the proposed statutory tort for serious invasion of privacy requires proof of intention or recklessness to establish liability. It is clearly designed as a fault-based tort. Indeed, it imposes a high level of fault in order to establish liability. Negligence would be insufficient to establish the statutory tort. Consequently, liability for the statutory tort of serious invasion of privacy will be much more difficult to establish than liability for defamation. A superadded requirement of proof of serious harm for the statutory tort of serious invasion of privacy is unnecessary.

Evidence of privacy infringements

1.10 Australia's Right to Know Coalition submission relies on a lack of evidence that journalists have invaded individual's privacy in Australia without any countervailing public interest.

1.11 Law reform in response to an empirically demonstrated problem is not the only legitimate type of law reform. We would point out that the proposed tort is intended to meet Australia's commitment to its obligations under the ICCPR and is a principled-based law reform to fill a long-standing and well-recognised gap in the protection of privacy of people in Australia, similar to that in comparable countries, and with due regard to competing rights and interests.

1.12 While we agree that the media in Australia have not engaged in the disgraceful phone hacking that occurred in the United Kingdom, we do not agree that the media in Australia *never* seriously invade individual privacy where there is no public interest. For example, there have been unjustified investigations into and revelations of the private medical circumstances or relationships

of people who happen to be in the public eye for unrelated reasons. These invasions have often fallen in the gaps of legislation to protect against surveillance, and even if they were caught, there is no remedy for victims in these criminal provisions.

1.13 While the Coalition referred in its evidence to other accountability measures, it did not give examples of where or by whom the media have been held accountable for privacy breaches. References are made to codes of conduct but the proposed exemption expressly applies despite any breach of any code of conduct.

Protection of the legitimate business of the media

1.14 We understand the apprehension of the media that well-resourced and powerful plaintiffs would threaten under-resourced media entities with legal action that would prevent journalism from exposing matters of public concern and importance. This is exactly what the hurdle of public interest for a cause of action - and the particular reference to freedom of speech in the injunction provision - is designed to prevent.

1.15 We think it is a weak argument that any business entity should be able to seriously invade another person's privacy for mere tittle-tattle where there is no legitimate public interest simply to enable the first entity to stay in business.

2. Response to the Law Council of Australia Submission 67.

2.1 We note that, despite the Business Law Section Media and Communications committee's objection to a statutory tort, the Law Council (at paras 107 and 110) reiterates its support for the introduction of a statutory tort "on the condition that there are sufficiently high thresholds to ensure actions are limited to serious invasions of privacy".

2.2 The Law Council (at para 108) proposes that the statutory tort be included in the second tranche of reforms to Australia's privacy regime. In view of the important drafting issues that need to be considered, changed or attended to, e.g, the redrafting of cl 7 (3) and s 7 (4), we agree that it would be preferable to defer the further passage of the Bill to the second tranche of reforms, and/or for the Bill to be brought back to Parliament when those drafting issues have been resolved.

2.3 We agree (with para 113) that cl 7(1) should be redrafted so that the actionability of the tort is expressly subject to the public interest balancing by the court being held to be favour of the plaintiff.

2.4 We do not agree that cl 7(6) (b) and (c) as drafted are unduly broad. We fail to see how the motive of a journalist's source could be relevant to whether the journalist acted with or without malice. Malice is a subjective state of mind – a dominant improper motive. There is no doctrine of transferred malice.

2.5 We do not understand how any exemption under the *Privacy Act 1988* (Cth) from its other provisions are relevant to whether or not an entity or organisation should be subject to or exempt from the new tort. Exemptions to the new tort should be expressly enacted and limited to the tort. Indeed, we believe that there is a good case for enacting the new tort in a separate Act to avoid this sort of confusion and so that complex issues of statutory interpretation are avoided.

2.6 We do not agree with para 116 and the recommendation of a defence of public interest. Indeed, we are at a loss to understand how it could be considered that such a defence is necessary, desirable or operative in view of the public interest hurdle and balancing that is part of the actionability of the cause of action. A defence would provide a weaker protection of media interests that the proposed hurdle within the cause of action. If the hurdle remains, any such defence is redundant. We refer to paras 1.6-1.8 above where we reiterate this point.

2.7 Para 120: "The journalism exemption is too narrow in being limited to news, current affairs and documentaries." We note again that *any* exemption for journalists would be a world first, as far as we know, in privacy laws. We note that the ALRC recommended that "freedom of expression" as a matter of public interest to be counterbalanced with an interest in privacy should extend to matters of "artistic expression". This is not in the Bill. We do not think satirists, comedians or entertainers should have an absolute exemption from liability for revealing strictly private information or otherwise seriously invading privacy.

2.8 In relation to the Recommendation 17 in para 122: we agree with the desirability for express reference to the ICCPR in Paragraph 1(e) and suggest that it should read "in relation to privacy and, among other things, freedom of expression" and that there could be express reference to both Art 17 and Art 19.

3. Follow up on Professor McDonald's evidence to the Senate Committee in relation to the drafting of cl 7(1) and 7 (3).

3.1 On reflection, we feel that the simplest way to incorporate the balancing of the public interest in the plaintiff's privacy with any other relevant public interest arising from the facts before the court would be to add as a further sub-clause to cl 7 (1):

> (e) the court is satisfied that the public interest in the plaintiff's privacy outweighs any countervailing public interest.

3.2 The existing cl 7(3) should be replaced by:

For the purposes of s 7(1)(e), the court may consider, along with any other relevant public interest matter, the following matters of public interest:

a) freedom of expression, including political communication and artistic expression;
b) freedom of the media, particularly to responsibly investigate and report matters of public concern an importance;
c) the proper administration of government;
d) open justice;
e) public health and safety;
f) national security; and
g) the prevention and detection of crime and fraud.

3.3 On reflection, we think that there is no need for the legislation to make any express reference to any onus of proof. As is usual, all parties will be free to set out relevant facts in their pleadings and to make submissions to the court on matters of law. (We appreciate that this differs from the ALRC Report 123.)

4. Response to the Australian Industry Group Submission 42

4.1 The AIG opposes a statutory tort, with a particular concern about employee records. We would simply point out that there is no proposal to extend the fault element to negligence or strict liability; and that the Bill provides a defence for conduct authorised or required by law or by consent.

4.2 We do not agree that the proposed tort should specifically provide that it covers the field, and that no common law rights should be developed, particularly in view of the Bill's exemption for journalists and related entities. Indeed, it may be that journalists themselves may seek privacy rights.

4.3 We do not see any reason why small business entities, which are largely exempt from the *Privacy Act* 1988 (Cth) should be free to intentionally or recklessly invade people's privacy. For larger entities too, the tort targets conduct for which there is currently no redress by victims.

Barbara McDonald
David Rolph
4 November 2024