SUPPLEMENTARY SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE INQUIRY INTO THE *PRIVACY AND OTHER LEGISLATION AMENDMENT BILL 2024*

4 NOVEMBER 2024

Australia's Right to Know Coalition (**ARTK**) welcomes the opportunity to provide this supplementary submission on the *Privacy and Other Legislation Amendment Bill 2024* (Cth) (the **Bill**). This submission follows ARTK attendance at the Committee hearing on 22 October 2024 and responds to some questions on notice and an offer to respond to other submissions made to the inquiry.

CONTEXTUAL BACKGROUND

ARTK submits that some of the questions posed and ARTK's responses should be considered in light of the following contextual material:

1. The Australian Law Reform Commission's (ALRC) 2013-2014 *Serious Invasions of Privacy in the Digital Era Report* (**the ALRC Report**) acknowledged – unlike many of the submissions made to the Committee – that Australian law did not have many of the foundational laws protecting the public interest that exist in other jurisdictions who have adopted a tort.[1]

   In particular, the ALRC Report recognised that in almost all jurisdictions that have a tort, it is governed by an overriding right of free speech enshrined in law.[2] That protection does not exist in Australia. Thus, the ALRC accepted that in the absence of those overarching laws it was "essential" that ALRC include the public interest in free speech as an element of the tort it proposed and not a mere defence. In evidence to the Committee Professor McDonald conceded that the drafting of clause 7(3) of the Bill departed from that principle and that she had "no idea" why that had occurred.

2. The ALRC Report and recommendations were not the outcome of any forensic investigation of media practices and many of its conclusions were based on assumptions that at best can be described as

[1] *European Convention of Human Rights*; *Human Rights Act 1998* (UK); *Hosking v Runting* (2005) 1 NZLR 1 (tort of misuse of private information) and *C v Holland* [2012] 2 NZLR 672 (tort of intrusion); *United States Constitution* First Amendment.

[2] See for example *United States Constitution* First Amendment and *Human Rights Act 1988* (UK).

speculative, including a lack of evidence to support claims of systemic issues of serious invasions of privacy by Australian media. Various submissions made to the Committee make similar assertions that the media has engaged in unjustifiable intrusions of privacy, without providing evidence of such and are without factual basis.[3] The reason no evidence was put before the Committee is not because of deficiently drafted submissions. The reason is that such evidence does not exist.

3. The ALRC Report did not engage in any assessment, apart from legal costs, of the cost of the tort to the Australian economy and specific business, in particular the media, nor did it provide any assessment of the damage a tort may cause to those involved in the provision of news reporting to the public.

4. The landscape in which privacy reform is now taking place has evolved considerably since 2013-2014. In the decade since the ALRC Report the following significant changes have occurred:
   - the OIAC has greater powers in relation to declarations and recompensing victims;
   - in defamation law the requirement of "serious harm" has been adopted by Australian legislatures as an appropriate counterbalance to excessive litigation and to protect the public interest;
   - there continues to be no evidence of any systemic or serious intrusions or misuse of information by media organisations nor is there any evidence of the breach of criminal laws by the media resulting in breaches of privacy;
   - the Australian media landscape has changed significantly including that the current economic landscape, competition from social media and the costs of litigation pose an existential threat to journalism. The current debate regarding privacy law and its impact on journalism appears to be being conducted without reference to this critical context;
   - serious intrusions and/or misuse of information are more likely to be engaged in by individuals on social media on other platforms; and
   - misuse of information from data breaches are more likely to be by foreign criminal actors who are unlikely to be deterred by or sued under the tort.

We set out below our responses to the committee's specific questions.

ARTK'S RESPONSE TO SUBMISSION 27 BY PROFESSORS MCDONALD AND ROLPH

The submission by Professors McDonald and Rolph[4] (**McDonald and Rolph**) provides some reasoned analysis and highlights several conceptual and drafting flaws in the Bill.

McDonald and Rolph's analysis of the Bill demonstrates the drafting of the Bill is flawed especially in relation to clause 7(3), in particular it fails to incorporate a public interest hurdle for all actions. They also concede that the journalism exemption in its current drafting is flawed and needs attention of the type proposed by ARTK to achieve its objective which is to protect journalism from the potential chilling effect of the tort and its possible interpretation by the Courts.

[3] See for example submissions 13, 24 and 54 to the Senate Legal and Constitutional affairs Legislation Committee inquiry into the *Privacy and Other Legislation Amendment Bills 2024*

[4] Submission 27 to the Senate Legal and Constitutional affairs Legislation Committee inquiry into the *Privacy and Other Legislation Amendment Bills 2024*

Professor McDonald's evidence to the Committee made it clear that the whole of the ALRC recommendation was based on the incorporation of a public interest element in the tort and that the current drafting had failed to achieve that "essential" outcome. Professor McDonald also noted that the requirement for the defendant to adduce evidence was not appropriate and that an element of the tort should require the consideration of the public interest "in any event". Professor McDonald specifically referred to Article 19 of the International Covenant on Civil and Political Rights (**ICCPR**), stating that the "hurdle should be there all the time" because "we don't want the Courts gummed up with too many actions". ARTK agrees with that evidence.

Significantly Professor McDonald expressed concern that the tort may be used to prevent discussion in the media and conceded this was a very serious issue as "we need to have a workable media". In that context she in effect acknowledged that the exemption was a legitimate choice for the Parliament as a safeguard of the public interest. ARTK believes that it is not merely a legitimate choice but a prescient decision to limit the impact of the tort on the media. However, ARTK notes the exemption requires amendment (as we have submitted in our original submission to the Committee[5] (**the first ARTK submission**) to properly achieve that objective.

McDonald and Rolph also acknowledges that the Bill does reflect, albeit inadequately in its drafting, some of the recommendations of the ALRC.

LIABILITY CLAUSE

McDonald and Rolph note that the ALRC considered it *essential* to include in the legislation explicit recognition of and protections for the media's investigative and reporting functions. They proposed to achieve this by building it into a liability clause only.

They agree with ARTK that section 7(3) – the liability clause that purports to achieve that protection – is flawed, in that:

- it is not well drafted;
- it "hides rather than elucidates the public interest that is to be balanced with privacy";[6] and
- there are competing interests in relation to the onus of proof in relation to any public interest.

They also agree that defendants should not be required to adduce evidence of public interest in every case, due to costs and complexity but principally because the "public interest" should be assessed by the Court in any event.[7] Instead, they submit that defendants should be "permitted to adduce evidence relevant to public interest considerations if they think it is appropriate or necessary".[8] ARTK agrees with the submission that the flawed clause needs to be redrafted so the public interest requirement applies to all actions.

However, ARTK notes the inclusion of the public interest in the liability clause is highly likely to be insufficient to protect free speech absent an overarching legal protection such as those that exist in other jurisdictions and it is likely that judicial interpretation will diminish its fundamental importance. The evidence of Professor McDonald is not contrary to that proposition, and she acknowledged that ensuring the public interest is

[5] Submission 59 to the Senate Legal and Constitutional affairs Legislation Committee inquiry into the *Privacy and Other Legislation Amendment Bills 2024*

[6] Op cit
[7] Op cit
[8] Op cit

properly recognised is difficult to enact in a "robust way". This has proved to be the case in relation to other "protections" such as legislation on suppression orders and source protection (discussed further below) which highlight the need for an exemption to avoid a similar outcome. Accordingly, an exemption is required to protect free speech and the media's important role in that and the democratic process and is not inconsistent with the principles Professors McDonald and Rolph advocate.

- **Serious harm**

  ARTK notes that in relation to "serious harm" McDonald and Rolph note that clause 7(2) makes the tort actionable without proof of damage stating that "this feature of the cause of action rests on the exacting fault element and the requirement of seriousness".[9] However, as ARTK has submitted, either in its interpretation or in practice, if such an exacting approval is not adopted by the Courts the rationale for not including a serious harm element falls away.

  McDonald and Rolph also note that absent that exactitude, not requiring harm would "be inconsistent with the law in general" and with defamation law.[10]

  ARTK submits that as a matter of principle and consistency across legislation where there are significant countervailing public interests to be protected and exposure to considerable costs and liability, that the award of any damages should be consistent with the law in general. A plaintiff should be required to demonstrate serious harm to sustain any action.

- **Damages**

  McDonald and Rolph identify several issues with the drafting in relation to damages.

  - Firstly, the issue with awarding aggravated damages which is broadly consistent with ARTK's submission on that issue. Namely, the types of conduct which would give rise to an entitlement to damages under the proposed tort would already meet the common law test for the award of aggravated damages – that the conduct be improper, unjustifiable or lacking in *bona fides*. As such, it would add unnecessary complexity to include aggravated damages when the court will already assess the same elements in determining the plaintiff's entitlement to damages; and
  - Secondly, they also note that the relationship between defamation and privacy is highly problematic and the damages drafting does not solve this issue.[11]

  Further, McDonald and Rolph suggest including damages for emotional distress.[12] While ARTK does not consider this necessary, if any such damages were included it should also be subject to the defendant demonstrating serious harm.

  McDonald and Rolph's submission underlines that the drafting in relation to damages is very problematic albeit for different reasons than those previously identified by ARTK in its submission to the committee.

[9] Op cit
[10] Op cit
[11] Op cit
[12] Op cit

- **Proposed journalism exemption**

That no similar exemption exists in other jurisdictions ignores the fact that Australia does not have adequate protection for the public interest in free speech other than by an exemption in the law

They repeat the suggestion that there is no similar exemption in the jurisdictions that have legislated a tort. However, both the ALRC report and Professor McDonald's evidence to the Committee proceed on the basis that Australia, other than its treaty obligation in relation to Article 19 of the ICCPR, does not have the same overarching protections for the public interest. The absence of such protections is central to the form of the liability section proposed by the ALRC and the submissions of McDonald and Rolph.

As noted above, that submission identifies that the proposed drafting falls short of the protections they clearly see as necessary. ARTK believes that a robust protection of the public interest can only be achieved by the adoption of an exemption.

The conflation of criminal and civil liability

McDonald and Rolph also note that if a crime were committed by the media the tort wouldn't apply. This mixes criminal liability with a civil liability which should be avoided. ARTK believes this is not a principled approach to defining a new cause of action.

However, in evidence Professor McDonald seemed to suggest the real concern was that a victim would not be entitled to compensation for the crime. ARTK notes that there are many statutory mechanisms that deal with the compensation of victims of crime which are a more appropriate vehicle to address this issue.[13]

The balancing act requires the public interest in free speech to be included in an exemption

Notwithstanding the flaws identified in section 7(3), McDonald and Rolph note that the balance between competing interests was taken into account in the ALRC model at the level of liability namely by the inclusion of a section which enshrines that balance, unlike section 7(3).

ARTK's response to this is that the manner in which that has been done does not adequately recognise freedom of speech and still gives priority to privacy (notwithstanding that 7(3) itself requires amendment). The section at 7(3) – even in amended form – does not strike an appropriate balance and at least for that reason (and those identified above) a proper exemption is required.

Significantly, they also note that:

- to the extent the Parliament considers an exemption required, it is not clear why the term journalist is not defined more widely; and
- the definition of 'journalistic material' will make the exemption narrower than intended.

Therefore both definitions require amendment.

[13] See for example *Victims Rights and Support Act 2013* (NSW); *Victims of Crime Assistance Act 2009* (Qld); *Criminal Injuries Compensation Act 2003* (WA)

ARTK agrees with these submissions and has proposed two amendment options in the first ARTK submission to the Committee.

How can the proposed exemption be amended to ensure it is properly comprehensive journalism exemption that gives full coverage

In relation to the nature of the amendment required, during the hearing ARTK was asked if another option for amendment would be adequate (including, for example, by editing the exemption as proposed in the Bill.

ARTK restates that the drafting of the exemption in the Bill is flawed and requires deletion and replacement by one of the two options in the first ARTK submission.

THE RISK OF LITIGATION AND THE EXEMPTION

McDonald and Rolph acknowledge the tort brings with it the threat of litigation but assert that of itself does not justify the exemption.[14] However the submission and the evidence given by Professor McDonald make it clear they support a proper mechanism for the protection of the public interest as being essential and that the use of the tort to prevent media discussion of issues was "a very serious issue" and "we need to have a workable media".

ARTK supports the later contentions and notes that McDonald and Rolph do not analyse the impact of the threat of litigation and of actual litigation on maintaining a workable media. Such an analysis is also notably absent in most of the submissions made to the committee.

McDonald and Rolph submit that at a minimum if the exemption is to be retained it should not apply if someone has committed a crime in the invasion of privacy.

ARTK's response to that is that should be the province of criminal law, which continues to apply irrespective of the exemption, and that any concern relating to compensation can be addressed through the statutes dealing with the compensation of victims of crime.

Additionally, ARTK notes that any exception within the exemption will defeat its purpose which is to avoid costly litigation involving the media which will have a significant chilling effect. Considerable time and cost will be involved in litigating any exception to the exemption.

- **What is the likely effect of the Injunctive relief clause? Will it operate to close down public discussion? How does it intersect with source protections legislation?**

  ARTK set out detailed concerns and evidence of the use of similar provisions in the UK in Section Two of the first ARTK submission.

  However, it is clear:

[14] Op cit

- high net worth individuals and public figures have used similar provisions elsewhere to close down public debate; and
- in the UK the damage to media reporting has resulted in a review of the legislation.

As indicated in the first ARTK submission, we are concerned that prospective plaintiffs, where they are seeking to establish a cause of action in tort, will engage in pre-discovery actions against the media. Under Federal and State court rules, an applicant can seek preliminary discovery for the purpose of identifying a person against whom they believe they may have a cause of action. The applicant only needs to establish that:

- they have made reasonable enquiries;
- are unable to authorise the identity of the person; and
- the relevant journalist/media organisation is in possession of material that would help identify the person.

With the introduction of a tort of privacy, it can be assumed prospective plaintiffs will avail themselves of every opportunity of redress which will impact on the flow of information in the media and on sources' protection or their willingness to provide information to the media.

As the Law Council's submission makes clear, careful consideration needs to be given to the interplay of this clause with other laws "to ensure that procedures cannot be used to circumvent the strict requirements of obtaining a suppression or non-publication order".

Impact on sources, including interaction with s.126K of the Evidence Act (the journalist shield)

Likewise, it is unclear how the provision will interact with s.126K of the Evidence Act (Cth) save to say that the legislation is very likely to be used by plaintiffs' lawyers to attempt to unmask confidential sources. It seems likely that the journalist shield in the Evidence Act will not always apply to assist journalists and their sources, given ambiguities and differences in the drafting, and the limitations built into those separate provisions – so the existence of this separate protection for journalists under the Evidence Act cannot be relied on as solving the vulnerabilities of journalists and their sources under the tort.

It seems the drafting hasn't given consideration to the interplay between the proposed privacy tort and journalists' sources.

The definition of journalist in s. 126(J) of the Evidence Act, which relates to the source protection in s. 126(K) is: "a person who is engaged and active in the publication of news and who may be given information by an informant in the expectation that the information may be published in a news medium".

This definition is different to the definition of journalist in clause 15. As McDonald and Rolph state in their submission "the proliferation of different definitions of the term 'journalist' should be avoided".[15] ARTK agrees with that submission and has made the same submission in relation to numerous pieces of legislation.

[15] Op cit

Importantly it underlines that consideration has not been given to the interplay between the proposed tort and source protection. In the first ARTK submission we highlighted that and the conflict it will cause which can be summarised as follows:

- there is a real risk that the tort will have a chilling effect on freedom of the media and reporting of matters of public concern as it will be used to prevent dissemination of information including to the media;
- in light of the breadth of the proposed cause of action, there is a real risk that it will be applied by a court so broadly as to:
    - restrict the reporting of investigations or matters of concern relating to public officials (where the constitutional protection does not apply); and
    - have the effect of prohibiting police investigations in an equivalent manner to the development of the tort in the UK; and
- the tort does not prevent individuals seeking interlocutory injunctions against other parties which would in effect apply against journalists and their employers to prevent publication of information to them, or otherwise passing on of the information to others.[16]

HAS ARTK PROVIDED REDRAFTING OF CLAUSE 15?

As acknowledged by McDonald and Rolph and the Law Council the drafting of clause 15 is problematic and requires attention. The mere amendment of and/or inclusion of further sub-classes in will not be adequate to address the issues identified by ARTK and McDonald and Rolph.

Both McDonald and Rolph and the Law Council agree clause 15 and its operation should be expanded (or redrafted) to give it proper legislative effect.

ARTK believes that to achieve the intention for the exemption and to simplify and conform the exemption with the existing legislation redrafting is not practical and will only add complexity. Therefore ARTK has provided two options for alternate drafting for clause 15.

As in the first ARTK submission, we offer the following to ensure a properly comprehensive exemption:

OPTION 1:
ARTK's preferred approach is to replace the proposed exemption with the following:

Part 3—Exemptions
15 Journalists etc.

(1) This Schedule does not apply to an invasion of privacy by any person engaged in activities related or incidental to the provision of information for, collection, preparation for publication, or other activities related or incidental to reporting news, presenting current affairs, expressing editorial or other content in news media or documentary media

If Option 1 is not acceptable to the Committee we offer the following :

OPTION 2:

[16] For more detailed discussion, see part 2 of the first ARTK submission

Part 3 – Exemptions

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 provision of information for, collection, preparation for publication, communication or other activities related and incidental to reporting news, presenting current affairs, expressing editorial or other content in news media or documentary media:

(a) a journalist;

(b) an employer of a journalist, or person or organisation engaging a journalist;

(c) a person assisting a journalist who is employed or engaged by the journalist's employer or person or organisation engaging a journalist;

(d) a person assisting a journalist in the collection, consideration and or preparation for publication, or who otherwise assists in the provision of information for, preparation of or in the course of reporting news, presenting current affairs or expressing editorial or other content in news media.

(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) 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.

ARTK RESPONSE TO OTHER SPECIFIC SUBMISSIONS ON THE EXEMPTION

ARTK notes that some submissions seem to make the incorrect assertion the exemption is unprincipled or is in some way unique.

The importance of freedom of speech and freedom of the media in preserving human rights and democracy is acknowledged in international treaties under which Australia has obligations (e.g. Article 19 of the ICCPR). Further, freedom of speech is a long-established common law freedom, which has been described by some High Court judges as a “fundamental” right or freedom. The common law of Australia affords a high value, and gives special recognition, to freedom of expression, which has been said to be “a matter of fundamental importance in a democratic society.”

Thus, the law has developed numerous mechanisms to enshrine this important role, many of which impinge on other private ‘rights’ or remedies. The rationale for these is to protect the public's interest in the free flow of information. The written submissions referenced below do not provide a detailed analysis of the tort or exemption in that context.

The nature of journalism is that information about third parties will be collected and disclosed without their consent, and often over their objection. Referring to amorphous “illegal and unethical” actions of journalists without any evidence is not a sound basis to proceed nor is it of itself a principled approach. The UK experience of increased “accountability” post Levenson (which is the sole example cited below) has led to a

significant, concerning and demonstrable decrease in press freedom in the UK. The submissions do not address that evidence.

Submission 12 by Professor Witzleb et al.

Witzleb et al oppose the journalism exemption, arguing it deviates from the ARLC model and lacks international precedent. The submission asserts that the exemption is unprincipled and would allow significant privacy invasions by the media without any evidence to support that contention.

This submission proceeds on the fallacious basis that the tort of privacy is an appropriate mechanism to stop what are tendentiously called “unethical practices” engaged in by media organisations.

The submission is flawed for the following reasons:

1. in asserting the exemption is unprincipled they do not balance Article 19 of the ICCPR which provides the same status to the importance of freedom of speech as privacy [at Article 17];
2. it cites no evidence to support the contention that the Australian media engages in "unethical practices". The failure to cite evidence is because the is no evidence at all of such practices by the Australian media;
3. it fails to acknowledge that the "unethical practices" referred to are already the subject of criminal sanction (the long-standing existence of the criminal laws may explain why they can't point to any examples and this being an issue requiring the enactment of a specific cause of action);
4. it ignores the considerable evidence that the post-Leveson (phone hacking) changes made in the UK to their laws have had a significant negative impact on reporting in the UK;
5. as a result of the negative impact referred to in 4 above, the UK Government in 2021 committed to an overhaul of the UK Human Rights Act to correct the pro-privacy imbalance that has developed in UK laws, which has been detrimental to free speech;
6. the ALRC model and the submission do not take into account the more recent and extensive consultation by the Government and changes in the media landscape. That consultation and the UK experience shows that ALRC public interest mechanisms will not provide an appropriate balance between free speech and privacy or a robust protection for journalism; and
7. it does not acknowledge that there are numerous examples in Australia and internationally where legislation includes an exemption for journalism, in particular in recognition of the right of free speech, including Article 10 of the European Convention on Human Rights (which also covers freedom of the press); the First Amendment in the US; and Australia's Privacy Act.

Submission 13 by Human Technologies Institute, UTS

Each of the items 1 to 7 above apply to the submission. In addition, the assertion that the journalism exemption in the Bill flows from the status of the organisation is incorrect. An analysis of the genesis of the exemption shows that it flows from a recognition of community expectations, the development of common law and international treaty obligations relating to free speech and freedom of expression.

The submission also conflates criminal activity, for which separate laws already exist to prevent or punish activities of the type described in the submission, with the proposed civil cause of action. As discussed above, a civil remedy is not a usual or appropriate response for concerns related to illegal or criminal activity or actions that should be treated as such. That is properly the remit of the criminal law which already addresses those concerns in the circumstances identified. In any event, the submission does not adequately analyse the operation of the exemption, nor does it acknowledge other legal restraints.

The submission also asserts that the exemption needs to be targeted in line with human rights and rule of law principles but in making that submission it glosses over the foundational human right of freedom of expression in Article 19 of ICCPR.