

4 November 2024



Ms Sophie Dunstone
Committee Secretary
The Senate Committee
PO Box 6100
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Committee Secretariat

**Inquiry into the Privacy and Other Legislation Amendment Bill 2024 [Provisions]
– Response to Question on Notice**

We thank the Committee for considering our submission to the inquiry into the Privacy and Other Legislation Amendment Bill 2024 (Bill). During the Committee's hearing on 22 October 2024, we were asked to take the following question on notice (transcript p 18):

Senator SCARR: I've only had a chance to read it today because of the abbreviated time, but I'm troubled by a number of the concerns they raise in relation to the statutory tort of privacy, including issues around collecting family medical history without express consent, collecting reports from other specialists without express consent, disclosing information to family members or authorities, raising concerns about colleagues' medical research using personal data, and it goes on. I ask you and perhaps all of the witnesses to take on notice the concerns raised by the Australian Medical Association about whether or not those are issues which have been canvassed in any of your activities in terms of ensuring we don't inadvertently, albeit through unintended consequences, impact upon Australians' ability to get health services that could be lifesaving in many cases.

Our answer to that question is as follows:

The Australian Medical Association (AMA) submission (Submission 26) raises concerns regarding possible unintended consequences of the introduction of the statutory tort for serious invasions of privacy including:

- **No equivalent to 'permitted health situations' in the new statutory tort:** The AMA raises several scenarios which are currently considered 'permitted health situations' under 16B of the *Privacy Act 1988* (Cth) (Privacy Act) but are not expressly excluded from the statutory tort or specified as a defence. Medical practitioners may collect family medical history provided without the relevant family member's explicit consent;

receive information from specialists without obtaining express consent from the patient; or disclose patient health information to third parties without the patient's express consent because they believe it is in their best interest. The AMA is concerned that practitioners could be sued for conduct that is not in breach of the APPs.

The AMA also notes that the current wording of paragraph 8(1)(b) in the Bill, which provides that it is a defence if 'the defendant reasonably believed that the invasion of privacy was necessary to prevent or lessen a serious threat to the life, health or safety of a person', is narrower than current s 16A(1) of the Privacy Act, which also includes threats to public health or safety.

- **Raising concerns about colleagues:** The AMA is concerned that the absence of a specific exception for employee records could expose practitioners to the risk of legal action in circumstances where they raise issues about the conduct of other practitioners with HR, supervisors, or other doctors before proceeding to a report to AHPRA.
- **Medical research using personal data:** The AMA notes that medical researchers rely on ss 16N(2) and (3), s 95 and s 95A of the Privacy Act to conduct research without express consent. The statutory tort as drafted does not contain an equivalent exception.

We have considered these concerns and highlight for the Committee the following elements of the proposed tort and its defences which we consider alleviate many of the concerns raised in the AMA submission.

1. **Reasonable expectation of privacy:** The proposed tort is intended to apply to serious invasions of privacy, in circumstances where a person has a 'reasonable expectation of privacy'. This formulation allows for the consideration of a range of circumstances where a person does not have a reasonable expectation of privacy, including in healthcare scenarios. The purpose of the invasion of privacy (paragraph 5(b)) is relevant, as is the nature of the information (paragraph 5(f)), along with many other factors. It is likely that exceptions already provided in the Privacy Act to the APPs (such as 'permitted health situations') should and would be considered in assessing whether or not an expectation of privacy is reasonable in all of the circumstances.

In respect of the use of personal information, an action is only available for 'misusing information', requiring as an element of the cause of action some impropriety in the use of the information. This is unlikely to extend to uses of information like those raised by the AMA which are otherwise permitted by the Privacy Act.

As a further limit, the tort applies only to 'serious' invasions of privacy, providing further limits on its application in the healthcare scenarios raised. For example, conduct which is explicitly not in breach of the APPs may not be considered a 'serious' invasion of privacy.

2. **Public interest includes 'public health and safety':** the tort requires a consideration of any countervailing 'public interest' which may justify the invasion of privacy. Many

aspects of public interest may be considered here, explicitly including 'public health and safety' in the list of potential public interest considerations at paragraph 4(e).

3. **Lawful authority:** Mandatory reporting to AHPRA and other practices required or authorised by law would attract the lawful authority defence: subparagraph 8(1)(a).
4. **Defence of necessity:** There is a defence of necessity to prevent or lessen a serious threat to the life, health or safety of a person: subparagraph 8(1)(c). The test is subjective, such that a respondent would only need to show that they believed the action was necessary. The ALRC report identified the defence of necessity as being particularly important for healthcare professionals.¹ The Explanatory Memorandum for the Bill notes that the threat to life/health/safety must only be serious, not necessarily imminent (at [433]).

As the ALRC report which informs this proposed tort makes clear, the structure of the tort provides limits for its application without the use of extensive and specific exemptions.² This allows public interest considerations in protecting privacy and countervailing interests to be balanced, while providing a previously absent mechanism for people to remedy serious invasions of their privacy.

Yours sincerely

Ellen Tilbury
Principal Solicitor

¹ Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* (ALRC Report 123, 2014), p 195.

² *Ibid*, p 217.