



Australian Human Rights Commission response to Questions on Notice

Re: Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the *Privacy and Other Legislation Amendment Bill 2024*

Question One

Hansard text:

Senator SHOEBRIDGE: I have a question for the Human Rights Commission. You set out in your submission concerns about doxing and the need for some kind of protection for public interest communications on doxing? Do you recall that, Commissioner Finlay?

Mrs Finlay: Yes, I do.

Senator SHOEBRIDGE: Indeed, you are not the only organisation to have concerns about the potentially broad scope of the doxing provisions. Have you had a chance to look at the submission from the Australian Christian Lobby?

Mrs Finlay: Unfortunately, I have not.

Senator SHOEBRIDGE: Can I ask you on notice to turn your attention to some quite disturbing propositions in the submission from the Australian Christian Lobby. One is in relation to social media post on Twitter from an entity that begins with @Celinev. On Twitter, they shamed and doxed a primary school teacher, showing images of the teacher, identified which school they worked out, and attacked her for running a queer support group in her primary school. Could I ask you to consider on notice if you agree or otherwise with the Australian Christian Lobby's view that there was a public interest in that?

Mrs Finlay: [inaudible]

Senator SHOEBRIDGE: The other is another deeply troubling and offensive post from an entity described as 'Billboard Chris', attacking Teddy Cook, who is on the World Health Organization's advisory panel on guidelines to transgender health. The eSafety Commissioner identified some appalling elements of that post being the misgendering and insulting of Teddy Cook and an equating of transgender identity with mental illness. Again, the ACL seems to think there is a public

interest in that. Could I ask you to review that as well and see how you think if/or any public interest elements may be considered in the case like that?

Mrs Finlay: Yes, we are happy to do that on notice.

...

Senator SHOEBRIDGE: Well, to assist in balance, I might ask you, also on notice, to provide your response in relation to that incident—the one that has set off this most recent round of proposed reforms. That might allow for that—

Mrs Finlay: The doxxing based on the WhatsApp creatives group?

Senator SHOEBRIDGE: Indeed.

Mrs Finlay: Certainly

Australian Human Rights Commission response:

The inclusion of a provision which expressly protects the release of information for legitimate public interest purposes is intended to strengthen the protections available to public interest whistleblowing and journalism. None of the three examples highlighted appear to fall within this intended ambit.

In drafting a provision that protects the release of information for ‘legitimate public interest purposes’ it would be open to the Parliament to include a non-exhaustive list outlining the factors that may be considered to establish a ‘legitimate public interest purposes’. This would make the scope of the provision more certain and predictable. To that end, it is relevant to note the observations made by French CJ in *Hogan v Hinch* when considering the term ‘public interest’:¹

‘When used in a statute, the term derives its content from “the subject matter and the scope and purpose” of the enactment in which it appears. The court is not free to apply idiosyncratic notions of public interest.’

Question Two

Hansard text:

Senator SCARR: Mrs Finlay, do you have a view on the exclusion of codes which were adopted in emergency circumstances—their being exempted from disallowance processes of the parliament?

Mrs Finlay: It's not something that we've specifically turned our minds to in this context, but we'd be very happy to take it on notice if you'd like some considered views.

Australian Human Rights Commission response:

Scrutiny of delegated instruments is essential to ensure compliance with statutory requirements, the protection of individual rights and liberties, and principles of parliamentary oversight in Australia. For this reason, as a general rule, any exemption from disallowance should only be made with considerable caution.

In respect of the Privacy Amendment Bill, the Explanatory Memorandum sets out the why the creation of temporary APP codes should not be subject to disallowances under the *Legislation Act 2003* (Cth). For the reasons set out in the Explanatory Memorandum, the exemption from disallowance is – on balance – appropriate in these limited circumstances.

Question Three

Hansard text:

Senator SCARR: As usual, in your answer you've anticipated my next question, which was going to be: why aren't we protected in that regard because of the use of the words 'menacing' or 'harassing'? Can I turn the question on its head and say that there are people who present themselves as citizen journalists, who perhaps do have malicious intent and who could potentially use such an exception to try and avoid the intent of the legislation?

Mrs Finlay: Yes.

Senator SCARR: How would you address that concern if you've put in this proviso? I'm happy for you to take that on notice.

Mrs Finlay: I will take that on notice, if I may; however, we recognise there is a need for careful drafting in all cases involving public interest exceptions, because there is that question about where the line should be drawn. We say that including a legitimate public interest purpose would help to strengthen freedom of expression while still protecting

against the harms of doxxing, but it isn't a simple solution. We recognise that there are challenges in striking the right balance, so that is something that would need to be addressed in the drafting.

Australian Human Rights Commission response:

The Attorney-General's Department has given evidence that 'the concept of menacing and harassing is well established in the *Criminal Code*' and establishes 'a serious threshold'.² However, this contrasts with the submission made by the Law Council of Australia, who stated that:³

'The Bill also should provide further guidance on what constitutes "menacing" or "harassing" behaviour. As drafted, there is no clear definition of what behaviour constitutes "harassing" – the term most likely applicable to doxxing'.

While there is a risk of individuals with malicious intent potentially attempting to (mis)use the proposed legitimate public interest exception to try and avoid the intent of the legislation, there is equally a risk that if the offence is defined too broadly and the exceptions are defined too narrowly, that freedom of expression will not be sufficiently protected. In order to strike the right balance, the legislature needs to carefully consider the precise language used in drafting. This will involve drawing an appropriate line between protecting freedom of expression and combatting doxxing.

¹ *Hogan v Hinch* [2011] HCA 4, [31] (French CJ).

² Senate Legal and Constitutional Affairs Legislation Committee, Proof Committee Hansard (*Privacy and Other Legislation Amendment Bill 2024*), 22 October 2024, 67 (Mr Reeve).

³ Law Council of Australia, *Privacy and Other Legislation Amendment Bill 2024*: Submission to Senate Legal and Constitutional Affairs Legislation Committee, [133].