Human Rights Law Centre

31 March 2023

Privacy Act Review
Attorney-General's Department
CANBERRA ACT 2600

By email: privacyactreview@ag.gov.au

Response to the Privacy Act Review Report

The Human Rights Law Centre welcomes the opportunity to provide feedback to inform the federal government's response to the Attorney-General's Department's Privacy Act Review Report (**Report**).

The proposals in the Report are a welcome step towards bringing the *Privacy Act 1988* (Cth) **(Privacy Act)** into line with international standards. We welcome the Report's engagement with the limitations of existing privacy protections in Australia at a time when the collection, use and storage of personal data is increasingly implicated in nearly every facet of people's lives.

Our feedback relates to the proposal for a statutory tort for serious invasions of privacy, and the proposals dealing with profiling and targeting in the context of the risks posed by the amplification of disinformation and other harmful content online.

Privacy is a human right and requires stronger protection in Australia

The right to privacy is a human right recognised in international instruments to which Australia is a signatory, including the *International Covenant on Civil and Political Rights* (**ICCPR**) and the *Convention on the Rights of the Child*.

The legal framework for the protection of personal information is critical to the broader right to privacy under these instruments. According to its preamble, the Privacy Act was intended in part to implement Australia's obligations relating to privacy under the ICCPR, and the significance of this area of human rights law is growing in the digital age. In recent years, the right to privacy has

Melbourne Office
Human Rights Law Centre
Level 17, 461 Bourke Street
Melbourne VIC 3000

Sydney Office
Human Rights Law Centre
Level 5, 175 Liverpool Street
Sydney NSW 2000

admin@hrlc.org.au
(03) 8636 4450
www.hrlc.org.au

been the most commonly engaged human right identified in legislation subject to comment by the Parliamentary Joint Committee on Human Rights.[1]

The prohibition on arbitrary interference with privacy enables the protection and enjoyment of other human rights, including freedom of expression and opinion, freedom of assembly and association and freedom from discrimination. In the context of the digital space, appropriate privacy protections play an important role in defining the limits of evolving online data collection practices that are used to amplify and target content and advertising in a manner that has wide-ranging ramifications for a range of other human rights.

People should have greater control over their personal information and greater visibility of how it is used

The Human Rights Law Centre supports amendments to the Privacy Act to give people greater choice and control over the collection and use of their personal information.

For people in the European Union and beyond, rights to access, explanation, erasure, correction, objection, and deindexation are now mandatory minimum standards in line with the *General Data Protection Regulation* (**GDPR**). Reform of the Privacy Act represents an opportunity to learn from and improve upon the regulatory models of our global counterparts.

There is currently no right under Australian law to opt out of the collection, use or disclosure of personal information for the purpose of direct marketing or targeted advertising. This means that people have little control over the use of their personal information to direct advertising at them through websites and apps, based on their behaviour and personal attributes such as gender and interests. In addition, because many forms of collected information do not meet the existing definition of personal information, many instances of targeting are currently outside the scope of the Privacy Act. The proposed expansion of the definition of personal information would be an important limit on excessive data collection and profiling.

Proposals 20.1, 20.2 and 20.3 also seek to address these issues by giving individuals additional rights in relation to direct marketing and targeted advertising, and by placing additional obligations on entities that handle data. These are strong steps in the direction of international best practice, and could be further strengthened by:

- placing limitations on the collection of personal information (instead of permitting its collection and then providing options around its use); and
- establishing that default settings should require an 'opt-in' rather than an 'opt-out' for direct marketing and personalised advertising.

The principle of data minimisation in this context supports not only the right to privacy itself, but efforts to address the significant risks associated with the amplification of disinformation and other harmful content online. Limiting excessive data collection and the role of recommender systems is an important check on the human rights risks posed by micro-targeted disinformation campaigns that can turbo-charge discrimination, facilitate political manipulation and distort public debate on matters of critical importance.

Proposal 20.9 would require entities to provide information about targeting, including clear information about the use of algorithms and profiling to recommend content to individuals. The European Union's recently-enacted *Digital Services Act* represents an instructive model in this regard, including its requirement that large platforms provide users with clear, accessible and comprehensible information on the parameters used in their recommender systems for content and advertising, and options to influence these parameters, with at least one option that is not

[1] Parliament of Australia, Parliamentary Joint Committee on Human Rights, *Annual Report 2021*, [3.8]-[3.9]; Parliamentary Joint Committee on Human Rights, *Annual Report 2020*, [3.10].

based on profiling.[2] The *Digital Services Act* also requires very large platforms to maintain a repository of information about advertisements for at least a year after the last time an advertisement is displayed, including information about targeting and reach.[3]

Instead of permitting profiling by default and allowing users to opt out, reform in Australia should go further by requiring default settings to not be based on profiling. This would ensure that users who are less aware of the operation of recommender systems will not be treated less favourably, and would limit the role of personalised content recommendation systems in amplifying disinformation and content with the potential to cause societal harms.

A statutory privacy tort with appropriate safeguards

The Human Rights Law Centre supports, in principle, the establishment of a statutory tort to provide redress when privacy is violated. Despite the importance of the right to privacy, Australian law does not presently provide access to direct remedies for its violation. That should change.

However, we are concerned about the potential use of a statutory tort to undermine press freedom and whistleblower protections. In other jurisdictions, particularly the United Kingdom, privacy and data protection claims have emerged as an adjunct to defamation as a legal tool to silence public interest journalism. We consider there to be a reasonable possibility that if a statutory privacy tort is enacted in Australia, it will be used by individuals subject to adverse media reporting, against media companies and potentially sources, such as whistleblowers. We are concerned about the potential chilling effect of such litigation, given the likely financial burden on news publications. It is possible that, should a robust privacy tort be introduced, some public interest stories will not be told for fear of privacy litigation.

Of course, it is possible to imagine situations of journalistic malpractice where a privacy tort should rightfully be engaged, notwithstanding the potential wider impact. Press freedom does not provide freedom from the requirement to conduct journalism responsibly and consistently with journalistic ethics. But where responsible journalism is in the public interest, exposing it to the threat of privacy torts may have a negative impact on democratic accountability. Part of the challenge in balancing these rights – the right to privacy on one hand and the right to freedom of expression (including press freedom) on the other – is the absence of an overarching human rights framework in Australia, such as a federal charter of rights. Without such an overarching framework, there is a material risk that the establishment of a statutory tort, absent appropriate safeguards, could unduly impact press freedom, journalists and whistleblowers.

Accordingly, we recommend that further consideration be given to safeguards or exemptions, such as an exclusion for public interest journalism, as part of the enactment of a statutory privacy tort.

We need a well-resourced regulator with appropriate powers

Privacy laws need to be enforced in order to be meaningful and effective. In the European Union, the GDPR national supervisory authorities have significant investigation and enforcement powers, but weak enforcement has been attributed, among other reasons, to regulators lacking a culture of assertive investigation.[4]

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[2] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (***Digital Services Act***), Article 38.

[3] *Digital Services Act* (EU), Article 39.

[4] Irish Council for Civil Liberties, *Submission to the inquiry into the influence of international digital platforms*, Parliament of Australia, Senate Standing Committee on Economics, 28 February 2023.

In addition to the proposals in the Report that enhance individuals' ability to control their own personal information and seek redress for serious breaches, the obligations placed on entities should be reinforced by a well-resourced, independent regulator with the power to compel information and hold entities accountable for breaches. Accordingly, we support proposals to enhance the regulator's enforcement functions and information-gathering powers, as an essential complement to the substantive protections proposed in the Report.

We welcome bold and meaningful reform to better protect privacy in Australia and would welcome the opportunity to discuss our feedback.

Sincerely

Scott Cosgriff
Senior Lawyer