Submission to the Public Consultation on Doxxing and Privacy Reforms

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FIGHTING INEQUALITY IN AUSTRALIA

The Centre of the Public Square
A Per Capita initiative

PUBLIC CONSULTATION ON DOXXING AND PRIVACY REFORMS

The Centre of the Public Square at Per Capita

March 2024

The Centre of the Public Square (CPS) at Per Capita welcomes the opportunity to provide this submission to the Attorney-General's department as part of their *Public Consultation on Doxxing and Privacy Reforms.*

Per Capita is an independent think tank, dedicated to fighting inequality in Australia. We work to build a new vision for Australia, based on fairness, shared prosperity, and social justice.

The Centre of the Public Square works to build better models of citizen collaboration and strengthen civil society by imagining new methodologies and alternate technologies to anchor this public space.

This submission outlines our views on key principles the Australian Government should consider when designing laws and policies which aim to enhance privacy protections for individuals, including those which specifically address the practice of doxxing.

Introduction

More than 20 years have passed since the High Court of Australia (HCA) opened the door to the development of a cause of action for invasion of privacy in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd.*[1] In 2001 Callinan J declared that:

> [T]he time is ripe for consideration whether a tort of invasion of privacy should be recognised in this country, or whether the legislatures should be left to determine whether provisions for a remedy for it should be made.[2]

If the time was ripe at the beginning of the digital age in 2001, then today an avenue for individuals to seek redress for serious invasions of privacy is arguably overdue.

Per Capita looks forward to making further submissions as proposals for law reform in this area develop. At this point, we urge that the protection of free expression be a key concern when crafting these laws.

[1] (2001) 208 CLR 199.
[2] Ibid 335 (Callinan J).

Privacy is a major concern for Australians

Australians are increasingly concerned about privacy, particularly online privacy. Most want additional rights under Australian privacy laws.[3] Findings in the 2023 *Australian Community Attitudes to Privacy Survey* reveal that three in five Australians see the protection of their personal information as a major concern in their life; almost half of Australians had been informed that their personal information was involved in a data breach in the 12 months leading to the survey; and one in four of those said they experience harm as a direct result.[4]

In a separate survey conducted in 2023 by the Australian Institute of Criminology based on 13,887 computer users, almost half of all respondents said that they had experienced at least one instance of cybercrime, including doxxing, in the 12 months prior to the survey.[5]

Doxxing, which includes the deliberate online exposure of an individual's identity, private information, or personal details with malicious intentions, can bring about dangers for individuals in the physical world, ranging from humiliation to physical stalking. It can seriously damage someone's personal and professional reputation, leading to social and financial disadvantage.

Currently there are few avenues for individuals to seek redress for the harm caused by doxxing. A new statutory tort for serious invasions of privacy where there is intentional misuse of private information in circumstances where there is a reasonable expectation of privacy, would allow individuals to seek redress through the courts if they have fallen victim to doxxing.

There is no doubt that privacy should be protected. It is recognised as a fundamental human right in numerous international instruments and treaties that Australia has ratified.[6] The right to privacy is an important public interest, but it must be balanced with, and sometimes give way to other rights and interests. In all contexts the consideration of other rights and interests is important, but in the context of laws which relate to digital privacy rights and cybercrime, consideration of the public interest in freedom of speech, expression and of the press, is particularly vital.

Protecting rights and freedoms in the digital era

We live in an increasingly digital world. The internet has created a global city, and social media platforms constitute our new town square. Social media platforms provide cheap and accessible avenues for communication and increasingly function as the 'central arena in which political change

[3] Office of the Australian Information Commissioner, Australian Government, *Australian Community Attitudes to Privacy Survey* (Report, August 2023) 8 https://www.oaic.gov.au/__data/assets/pdf_file/0025/74482/OAIC-Australian-Community-Attitudes-to-Privacy-Survey-2023.pdf.
[4] Ibid 8-10.
[5] Isabella Voce and Anthony Morgan, *Cybercrime in Australia 2023* (Statistical Report No 43 Australian Institute of Criminology, Australian Government, 2023) https://www.aic.gov.au/sites/default/files/2023-06/sr43_cybercrime_in_australia_2023.pdf.
[6] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 17; Convention on the Rights of the Child, opened for signature 20 December 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 16; Convention on the Rights of Persons with Disabilities, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 22.

is initiated, negotiated, organized and communicated'.[7] On the internet, everyday citizens are no longer mere recipients of information. They now act as producers, curators, and distributors.

With 20.8 million social media users in Australia (78.3% of the total population) and 5.04 billion social media users around the world at the beginning of 2024,[8] platforms have carved out a central role in our social, cultural and political lives. Traditional barriers to participation in civically important discussions have been torn down, and a more egalitarian public sphere has emerged. In many ways this has been good for democracy, but in others it has been harmful, to both Australian democracy and individuals.

Australia's legislative response to cybercrime and online bullying and harassment in recent years has been to impose strict content removal obligations on platform providers, backed up with hefty penalties for non-compliance.[9] These laws prioritize the safety and dignity of platform users but pay much less attention to ensuring their right to free expression is protected, and that robust political debate in the new public sphere is unburdened. Many of these laws in Australia and abroad have been enacted in response to a *public shock*:

> [P]ublic moments that interrupt the functioning and governance of these ostensibly private platforms, by suddenly highlighting a platform's infrastructural qualities and call it to account for its public implications.[10]

The *Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019 (Cth) (AVM Act)* is one example of a reactive law made in response to a *public shock*. This was the live-streaming on Facebook of the 2019 terrorist attack on two Christchurch mosques, and murder of 51 people, which sent shockwaves through the global community.[11] This legislation received royal assent within 48 hours of its introduction to Parliament. It occurred without prior industry or public consultation, or any parliamentary committee review. UN officials expressed their concern to the Australian Government after the enactment of the *AVM Act*, noting that the absence of a thorough and comprehensive review has negative consequences for freedom of expression.[12] Academics, industry associations, and civil society groups also raised concerns about how the *AVM Act*

[7] Maik Fielitz and Karolin Schwarz, 'Hate Not Found?! Deplatforming The Far Right and Its Consequences' (Research Report, Institut fur Demokratie und Zivilgesellschaft, December 2020) 9 https://www.idz-jena.de/fileadmin/user_upload/Hate_not_found/IDZ_Research_Report_Hate_not_Found.pdf.
[8] Simon Kemp, 'Digital 2024: Global Overview Report', *DataReportal* (Web Page, 21 February 2024) https://datareportal.com/reports/digital-2024-australia; Simon Kemp, 'Digital 2024: Global Overview Report', *DataReportal* (Web Page, 31 January 2024) https://datareportal.com/reports/digital-2024-global-overview-report.
[9] *Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019* (Cth); *Online Safety Act 2021* (Cth).
[10] Mike Ananny and Tarleton Gillespie, 'Public Platforms: Beyond the Cycle of Shocks and Exceptions' (Conference Paper, Annual Conference of the International Communications Association, 25–29 May 2017) 2 https://blogs.oii.ox.ac.uk/ipp-conference/sites/ipp/files/documents/anannyGillespie-publicPlatforms-oii-submittedSept8.pdf.
[11] Commonwealth, *Parliamentary Debates*, House of Representatives, 4 April 2019, 1849 (Christian Porter, Attorney-General).
[12] Letter from David Kaye and Fionnuala Ní Aoláin to Marise Payne, 4 April 2019, 5 https://freedex.org/wp-content/blogs.dir/2015/files/2019/04/OL-AUS-04.04.19-5.2019-2.pdf.

burdened freedom of speech by incentivising platforms to 'err on the side of caution and remove more content than necessary, impinging on valuable free expression'.[13]

Freedom of speech (most importantly freedom of political speech), and a free media is fundamental to democracy. When the protection of free lawful expression is not given primacy in lawmaking, laws intended to prevent harm carry unintended consequences. Respecting privacy will in many ways promote free expression and the free media necessary for effective democracy, but privacy can also sometimes conflict with these important public interests. Where breaching someone's privacy is justified for an important public interest, privacy must give way.

The importance of the freedom of political communication in the digital public square for Australian democracy

Australia is a representative democracy, where representatives are directly chosen 'by the people'.[14] Indispensable to this system, is the ability for citizens to have access to information. As provided in the seminal case of *Lange v Australian Broadcasting Corporation*:[15]

> [E]ach member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia.[16]

For *the people* to properly perform their duties under the *Constitution*, they must have a 'true choice'.[17] This requires them to have 'an opportunity to gain an appreciation of the available alternatives.'[18]

The sort of information available to electors matters, but Australia's news media market is one of the most concentrated in the world.[19] Raymond Finkelstein observed in his *Independent Inquiry into the Media and Media Regulation*, that a concentrated media market presents 'obvious dangers'[20] to informed political debate, where ultimately, '[d]emocracy is the loser'.[21] The dangers to representative democracies can be offset by the democratisation of information.[22]

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[13] Evelyn Douek, 'Australia's "Abhorrent Violent Material" Law: Shouting "Nerd Harder" and Drowning Out Speech' (2020) 94(1) *Australian Law Journal* 41, 47; Meta, Submission No 14 to Parliamentary Joint Committee on Law Enforcement, *Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019* (October 2021) 22; Industry and Civil Society Organisations Submission No 9 to Parliamentary Joint Committee on Law Enforcement, *Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019* (September 2021) 14.
[14] *Australian Constitution* ss 7, 24.
[15] (1997) 189 CLR 520.
[16] Ibid 571 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).
[17] Ibid 560 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).
[18] Ibid, citing *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106, 246 (Dawson J).
[19] Senate Standing Committees on Environment and Communications, Parliament of Australia, *Media Diversity in Australia* (Report, December 2021) 7.
[20] Raymond Finkelstein, *Report of the Independent Inquiry into the Media and Media Regulation* (Report, 28 February 2012) 280.
[21] Ibid 281.
[22] See generally, David Tewksbury and Jason Rittenberg, *News on the Internet: Information and Citizenship in the 21st Century*, (Oxford Academic, online ed, 2012) ch 8.

Thus, the ability for social media platform users to create, distribute and engage with content, with ease, and at little cost, significantly offsets this danger.

The doxxing which spurred this consultation, the leaking of a private WhatsApp group which contained the private conversations and personal information of over 600 Jewish writers and artists, might be considered by some to be free speech. Some may claim that posting logs of this private communication was an exercise of their right to political communication. But neither of these freedoms are absolute, and the likely effect of this action, alongside the personal harm it caused,[23] is that many of the people in that group will remove themselves from public political debate. This hinders the quality of democratic debate and the diversity of political speech in the public sphere. Participating in public debate is perhaps just not worth it if it risks moving your family, losing your business or job, or damaging your personal or professional reputation. In this context, stronger privacy protections promote deliberative and representative democracy by ensuring all people can participate freely and safely in political debate and discussion.

Balancing freedoms when designing a statutory tort of serious invasion of privacy

Balancing privacy rights with other important values, freedoms and matters of public interest must underpin the design of any new statutory tort of serious invasion of privacy. It must be incumbent upon the plaintiff to establish that the invasion to their privacy outweighs public interest concerns from the outset, as part of the cause of action. This should be done rather than adopting a defence based on public interest as this increases the risk of the action being exploited to suppress socially desirable activities, like the important role of the media and freedom of speech. If it were only a defence rather than part of the action itself this may enable individuals, especially those supported by wealthy interest groups to instigate legal actions with the intent of silencing others who would then have to prove their innocence. This is not how the law should function. It is one of the big problems with defamation actions where the high costs of litigation often pressure defendants into settling, even if they believe they have a strong defense.

The public interest in freedom of speech and freedom of the press should be expressly recognised in any law providing for a new privacy tort. In the 2014 inquiry into *Serious Invasions of Privacy in the Digital Era*, the Australian Law Reform Commission considered that this would be 'particularly important, given Australia has not enshrined a right to free speech in its law in the way other democracies have'.[24]

Certainty in the law is important, but the elements of this tort must be flexible enough to adapt to rapidly changing technologies and capabilities, without the need for constant amendments.

[23] See, Chip Le Grand, 'Hundreds of Jewish Creatives Have Names, Details Taken in Leak, Published Online', *The Sydney Morning Herald* (Online, 8 February 2024) https://www.smh.com.au/national/hundreds-of-jewish-creatives-have-names-details-taken-in-leak-published-online-20240208-p5f3if.html.
[24] Australian Law Reform Commission, *Serious Invasion of Privacy in the Digital Era* (Final Report No 123, June 2014) 153.

Additionally, review periods must be built into any new law so that governments can assess any unintended consequences and react accordingly.

Other measures to protect against doxxing and other harms in the digital sphere

Law reform has a role to play in enhancing the protection of privacy both on and offline, but there needs to be a recognition that there are limitations to the law, and that education plays a vital role in curbing and preventing severe breaches of privacy.

In principle, Per Capita supports the introduction of a new statutory tort, but recognises that it won't be perfect, and that work must be done investigating and implementing other ways to promote and protect privacy. This is especially important in the context of communication in the digital sphere, which transcends jurisdictional boundaries. This law is about giving people an avenue for compensation. This is important, but there is a risk it will favour those with means, and is an imperfect solution for disincentivizing these harmful actions in the first place. Other measures and law reform options should be considered to curb doxxing and other harmful actions online.

Other laws are needed to help draw the line between what is acceptable communication online and what should be prohibited, removed, and punished. That will necessarily involve a rethinking of online speech regulations. Social media companies play a big role in defining what is acceptable speech on these platforms. Regulating how these companies create and enforce their rules should be a key concern of governments. Facebook is not a country and Twitter is not a government. They are mostly free to set their own rules and make decisions without constitutional constraints or democratic accountability. Delegating the responsibility for policing speech onto private companies, whose chief imperative is to generate profit, incentivises censorship, stifles political debate, and harms deliberative and representative democracy.

The Australian government should investigate how laws can be used to require these companies to behave in ways similar to what we expect of governments: with accountability, transparency and compliance with human rights norms and the rule of law. Providing ACMA with additional powers to gather information from platforms, request the development of industry codes focused on platform integrity, and where these codes are insufficient, create and enforce industry standards is an option which should be explored. Penalties could be applicable to non-compliance with codes and standards rather than using civil penalties to encourage the removal of lawful content.

The government should also consult on implementing statutory protections for speech and expression rights, particularly for political speech and expression in Australia. The constitutionally implied freedom of political communication is not adequate. It does not grant positive rights, rather it operates as a restraint on executive and legislative power. The HCA still grapples with uncertainties as to the scope of the implied freedom of political communication and to what degree it

may be intruded upon.[25] Its scope has been significantly limited since it was first recognised in 1992;[26] prompting legal scholars to dub the freedom: 'a delicate plant',[27] 'partial and unsatisfactory',[28] and 'a precarious freedom'.[29] Most recently, in *LibertyWorks Inc v Commonwealth*,[30] Steward J questioned whether the implied freedom of political communication even existed at all.[31] Additionally, the US Supreme Court's 2022 ruling in *Dobbs v. Jackson Women's Health Organization* shows us just how tenuous constitutionally implied freedoms can be.

Conclusion

The right to privacy is a fundamental human right. Enhanced privacy protections for individuals in Australia are necessary, and arguably overdue. As we increasingly move our lives online and the boundaries between the public and private sphere are progressively blurred, protecting the right to privacy and providing remedy for serious invasions of privacy is important.

Per Capita supports stronger privacy protections but other fundamental freedoms also require statutory protection. The protection of free and lawful expression on matters of political importance has a crucial impact on our democracy and must be given primacy in lawmaking. Where breaching someone's privacy is justified for the public interest of political communication, privacy must give way.

Other measures, including education about online privacy should be implemented in tandem with increased legislative privacy protections, and the Government should continue to investigate other ways to promote privacy, communication, and safety in our new online public square.

Per Capita is grateful for the opportunity to make this submission and looks forward to opportunities to make further submissions on this matter.

[25] *LibertyWorks Inc v Commonwealth* (2021) 274 CLR 1, 95 [249].
[26] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.
[27] Michael Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant* (Dartmouth Publishing, 2000) ch 2.
[28] Katharine Gelber,' Pedestrian Malls, Local Government and Free Speech Policy in Australia'(2003) 22(2) *Policy and Society* 22, 44.
[29] Katharine Gelber and Adrienne Stone, *Hate Speech and Freedom of Speech in Australia* (The Federation Press 2007) 3.
[30] (2021) 274 CLR 1.
[31] Ibid 113 [304].