CENTRE FOR MEDIA TRANSITION

Submission to Attorney-General's Department

Privacy Act Review Report 2022

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About the Centre for Media Transition

The Centre (CMT) was established in 2017 as an applied research unit based at the University of Technology Sydney (UTS). It is an interdisciplinary initiative of the Faculty of Arts and Social Sciences and the Faculty of Law, sitting at the intersection of media, journalism, technology, ethics, regulation and business.

Working with industry, academia, government and others, the CMT aims to understand media transition and digital disruption, with a view to recommending legal reform and other measures that promote the public interest. In addition, the CMT aims to assist news media to adapt for a digital environment, including by identifying potentially sustainable business models, develop suitable ethical and regulatory frameworks for a fast-changing digital ecosystem, foster quality journalism, and develop a diverse media environment that embraces local/regional, international and transnational issues and debate.

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Introduction

Thank you for the opportunity to contribute to this consultation process in response to the release of the Privacy Act Review Report 2022 (the Report). In both our November 2020 submission in response to the Privacy Act Review Issues Paper and our January 2022 submission in response to the Privacy Act Review Discussion Paper, we addressed a wide range of issues concerning the scope of the *Privacy Act 1988* (Cth), the regulation of privacy more generally and the operation of the Office of the Australian Information Commissioner (OAIC). In this submission, as we collectively reach the 'business end' of the law reform process, we do not restate all of our arguments, other than to say we continue to support the principles and positions evinced in those earlier submissions. Instead, in this submission we will make a few key points on a select range of issues, with a particular focus on the **journalism exemption** and various (as we see them) related issues, such as the introduction of a statutory tort for serious invasions of privacy. We do so recognising the importance of the issue of the journalism exemption, which does not always receive the airing it deserves, and recognising also that our submissions on the journalism exemption were prominently included in the Report.

Proposal 4.1

- **4.1 Change the word 'about' in the definition of personal information to 'relates to'. Ensure the definition is appropriately confined to where the connection between the information and the individual is not too tenuous or remote, through drafting of the provision, explanatory materials and OAIC guidance.**

We strongly support changing 'about' to 'relates to' in the definition of personal information. As the Report notes (p.26), this will bring Australian law into greater harmony with the GDPR and other international instruments. This will also remedy the outcome of the *Grubb* case, so that technical information becomes recognised as 'personal information', as it should be.

Proposal 4.2

- **4.2 Include a non-exhaustive list of information that may be personal information to assist APP entities to identify the types of information that could fall within the definition.**

We strongly support this proposal.

Proposals 4.3 and 4.9(c)

- **4.3 Amend the definition of 'collects' to expressly cover information obtained from any source and by any means, including inferred or generated information.**
- **4.9(c) Clarify that sensitive information can be inferred from information which is not sensitive information.**

We strongly support these proposals. As we have noted in our previous submissions, inferred data is one of the most vexing, and most important, issues attending the protection of privacy in a digital age. Given modern data flows, inferred data must fall within the purview of the Act. What's more, the issue will need to be regularly monitored and revisited

in order for the Act to have the best chance to regulate the misuse of inferred data effectively and fairly.

Proposals 9.1 and 9.2

- **9.1 To benefit from the journalism exemption a media organisation must be subject to:**
    - **privacy standards overseen by a recognised oversight body (the ACMA, APC or IMC) or**
    - **standards that adequately deal with privacy.**
- **9.2 In consultation with industry, and the ACMA, the OAIC should develop and publish criteria for adequate media privacy standards and a template privacy standard that a media organisation may choose to adopt.**

The Report contains a great deal of significant new material about the exemptions to the Act, and its Proposals for reform are bold. We commend this approach, noting that any reforms to the exemptions require careful deliberation, given the impacts are potentially wide-ranging.

The main focus of this submission is the journalism exemption. Our recommendation for retaining the journalism exemption, however, are accompanied be recommendations for the adoption of complementary reforms, including the introduction of a statutory tort and the introduction of a direct right of action under the Act, as well as (ideally) expansive reform of news media oversight in Australia.[1]

Specifically regarding the journalism exemption, we were pleased to see the inclusion in Chapter 9 (p.87) of the Report of our observations that:

- 'the journalism exemption "does not appropriately balance the freedom of the media to report on matters of public interest with individuals" interests in protecting their privacy because its replacement of the APPs with industry guidelines is not rigorous enough in its implementation';
- '"the requirement for a media organisation to subject itself to alternative privacy protections, suitable for newsgathering, should be strengthened and there should be a requirement for independent complaint-handling and decision-making"';
- 'for some organisations, the requirement to "publicly commit to privacy standards" could be met by a statement on a website';
- '"amending the journalism exemption without requiring something more than 'publicly committing' to unspecified privacy standards would render meaningless any reform of this aspect of privacy regulation"'; and
- '"access to the journalism exemption could be made contingent on participation within an industry-based scheme that is not operated by government, provided it meets criteria such as operating a complaints-handling scheme that is independent of any specific publisher"'.

Accordingly, we support the overall approach adopted in the Report (pp. 88-89) for the strengthening of the exemption by (italics ours):

- providing incentives for those who benefit from the exemption to be members of an *independent oversight scheme*;

[1] Wilding, D., and Molitorisz, S. (2022). 'Improving News Media Oversight: Why Australia needs a cross-platform standards scheme.' *Australian Journalism Review*, *44*(1), 19-38.

- establishing *minimum criteria* for the content of privacy standards that form the basis for an exemption;
- offering a *template privacy standard* to assist smaller industry participants who might benefit from the standard;
- requiring the OAIC to consider *processes for receiving and dealing with complaints*.

Applicable privacy standards and oversight bodies

Notwithstanding our general support for the approach adopted in the Report, we caution against the second limb of proposal 9.1; namely, the allowance for internal standards and complaints schemes.

While the introduction of minimum criteria under proposal 9.2 might work to ensure that, overall, the *content* of privacy standards is adequate, the operation of multiple internal privacy standards could further damage Australia's already fragmented, inconsistent and sometimes inadequate media schemes, as detailed in our previous research, which has identified 14 different news media codes.[2] The Report (p.85) cited ACMA's characterisation of the

> complex system of direct regulation, co-regulation and self-regulation which 'can result in gaps and discrepancies when it comes to content safeguards, with content providers often subject to different rules for the same piece of content when distributed on- and offline.'[3]

The second limb of proposal 9.2 could add to this complex system by authorising further internal arrangements, and could even work to draw news organisations away from independent industry schemes. The fact that, as the Report notes (p.88), internal schemes are recognised under the legislation for the News Media Bargaining Code (the 'professional standards test' in s 52P of the *Competition and Consumer Act 2010* (Cth)), does not mean this is good policy. In our view, the professional standards test in the NMBC is an unsatisfactory compromise that serves the interests of media organisations without adequate recognition of the public interest.[4] It was not unreasonable to expect that in return for this significant intervention by government in the media market, media businesses might be required to participate in an industry-based standards scheme with independent complaints handling. Unless the Department adopts only the first limb of Proposal 9.1 (membership of a scheme overseen by a recognised body), the Privacy Act Review – while raising the bar for privacy obligations – could undermine media standards more generally.

In our view, a better approach is to adapt the model used in New Zealand (described on p.88 of the Report) so that in order to qualify for the exemption, a media organisation must be:

- covered by a code of practice registered with the ACMA under Part 9 of the *Broadcasting Services Act 1992* (Cth) or notified to ACMA under the *Australian Broadcasting Corporation Act 1983* (Cth) or the *Special Broadcasting Service Act 1991* (Cth); or
- prescribed by the ACMA or another body as meeting the criteria for an independent media standards scheme including in relation to the handling of complaints.

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[2] Wilding, D. et al (2018). *The Impact of Digital Platforms on News and Journalistic Content*, pp. 87-88; Wilding, D., and Molitorisz, S. (2022). 'Improving News Media Oversight: Why Australia needs a cross-platform standards scheme.' *Australian Journalism Review*, *44*(1), 19-38.

[3] ACMA, *What Audiences Want – Audience expectations for content safeguards* (June 2022) 5.This is a point we made in our submissions to this review and in our 2018 report, *The Impact of Digital Platforms on News and Journalistic Content*, p.88.

[4] Giotis, C., Wilding, D., & Molitorisz, S. (2022). 'How Australia's competition regulator is supporting news, but not quality.' In Napoli, P. and Lawrence R. (eds) *News Quality in the Digital Age*, New York: Routledge.

Scope of the exemption

Summary We can summarise our approach by prescribing three necessary elements for reform of the journalism exemption:

1. Any reference to 'media organisation', as defined in s 6 and contained in s 7B(4), ought to be removed from the Act.
2. These references ought to be replaced with references to 'journalism', as opposed to 'journalist' (and accompanied by necessary adjustments to surrounding text). There have been contrasting approaches to the definition of journalism; however, we submit that the definition of journalism in the Act should limit the scope of the protection to *the process of gathering and publishing news*. This change will further require a definition of 'news'. Potential options include adopting the definition of 'core news' or the broader definition of 'covered news' as provided by the NMBC Act. At this stage, we take no position as to which definition of 'news' ought to be adopted, but caution against a definition that is overly broad.
3. The definition of 'journalism' must mandate membership of an external and independent standards scheme complete with a clear complaints mechanism.

In this way, for instance, a YouTube channel could potentially qualify for the journalism exemption, but only if it fits the definition of 'journalism' by producing 'news' and is subject to an external complaints scheme.

Explanation: We note the proposal in the Report to retain the current scope of the exemption, rather than to limit or expand it. In our submission to the Issues Paper in 2020, but not to the subsequent Discussion Paper in 2022, we suggested the exemption should be limited to professional journalists, not bloggers or citizen journalists. In light of other proposals, we have now revisited that position.

We acknowledge the motivation in the Report to encourage freedom of expression, but we are also concerned that the principle established in the Report is that *anyone* is able to gain the benefit of the exemption provided they meet the benchmarks for minimum privacy standards. Practitioners who are approved in this way will not necessarily have subscribed to other cornerstone ethical obligations of journalism such as a commitment to factual accuracy and the correction of errors.

Taking into account the points made in the Report and our continuing concern over the scope of the exemption, we propose a middle ground: that the exemption be available to individuals or organisations who are able to demonstrate their practice of journalism, to be defined in the Act or some other instrument. Apart from defining 'journalism' itself, this definition ought to stipulate membership of an external standards scheme complete with a clear complaints mechanism as a mandatory requirement. This would thus embrace individuals who are not otherwise professional journalists, providing they can point to a journalistic framework within which they operate, and external standards to which they are subject. The journalistic framework within which they operate would need to include most if not all the traditional conventions of journalism practice, including fairness, the right of reply where appropriate, and objective distance from sources and story, regardless of the platform on which the output appears and regardless of the form of the output.

One approach here would be to follow the lead of the News Media Bargaining Code. In s 52A of the *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021* (Cth) (NMBC Act), the News Media Bargaining Code arrived at an all-forms, all-platform inclusive definition of 'news source', which includes, among other things, 'a program of audio or video content designed to be distributed over the internet'. The NMBC Act in s 52A also included a definition of 'core news' and a more expansive definition of 'covered news'. And in s 52P, as noted above, it included a professional standards test as a requirement for any news media business to register under the scheme. A similar approach for defining journalism could be taken here. This would ensure

that anyone covered by the journalism exemption is subject to privacy standards under an independent and external scheme, but only provided they are performing acts of journalism that result in content recognisable as journalism.

The scope of the Act itself is also relevant to the operation of the journalism exemption. The Act only covers 'APP entities', in the form of an 'agency' or 'organisation'. Subject to some exceptions, it does not apply to individuals acting in their personal capacity, although it does apply to individuals such as sole traders who are acting in a business capacity. Meanwhile, the Act also contains the small business exemption, which means that the Act does not currently apply to businesses with an annual turnover of $3million or less. Proposal 6.1, supported by the majority of submitters, is that the small business exemption be removed following consultation with small businesses and other measures.

We support Proposal 6.1, recognising also that its adoption would make the journalism exemption all the more significant. Whereas previously a blogger, citizen journalist or small news site would likely have been covered by the small business exemption, the removal of such an exemption would mean that bloggers, citizen journalists and small news sites, to be exempt from the obligations of the Act, would need to take shelter under the journalism exemption. In light of this, we are prepared to adjust our stance from our 2022 submission to suggest that bloggers, citizen journalists, small newsrooms and the like *should* be able to rely on the journalist exemption, provided they fit the definition that we suggest should be provided in the Act or some other instrument, which will set the parameters of 'journalism', and which will mandate their membership of an approved independent, external standards scheme complete with adequate privacy standards and an established complaints process.

As we wrote in our 2022 submission, 'By making access to the exemption dependent on participation within a robust and accountable standards scheme – one that includes independent complaints-handling about news standards generally, not just privacy complaints – Parliament can help to maintain standards of reporting and promote alternatives to sources of mis- and disinformation.'

Proposal 9.3

- **9.3 An independent audit and review of the operation of the journalism exemption should be commenced three years after any amendments to the journalism exemption come into force.**

We support this proposal. Given the significant nature of these reforms, and the interconnected nature of reforms of the Privacy Act with other law reforms, an independent audit and review will be necessary. For instance, if a statutory tort of invasion of privacy is introduced, and if a direct right of action under the Act is introduced, and if there is significant reform of Australia's news media oversight schemes, these will all need to be taken into account in any audit and review of the journalism exemption. What's more, any adjustment to the small business exemption will also need to be taken into account, as discussed above. Indeed, the journalism exemption ought to be subject to ongoing audit and review, given the ongoing and dynamic changes occurring in both media and media law.

Proposals 9.4 and 9.5

- **9.4 Require media organisations to comply with security and destruction obligations in line with the obligations set out in APP 11.**
- **9.5 Require media organisations to comply with the reporting obligations in the NDB scheme. There will need to be some modifications so that a media organisation would not need to notify an affected individual if the public**

interest in journalism outweighs the interest of affected individuals in being notified.

Security and destruction

We do not support Proposal 9.4. Good journalism sometimes requires journalists to play the long game. The eventual #metoo exposure of Harvey Weinstein and Jeffrey Epstein followed numerous failed attempts by journalists to reveal systemic patterns of abuse and criminal behaviour. Journalists need to be able to return to their notes and records to be able to revisit such historic wrongs; the obligation as proposed could jeopardise some important investigations. What's more, in defamation actions, where the odds are often not in favour of journalists and news media, publisher defendants are disadvantaged if they do not have access to notes taken at the time. To pursue public interest journalism most effectively, and to be able to mount a fair defence against defamation claims, journalists ought to be able to keep notes and records. Admittedly, the Report says (p.92), 'OAIC guidance should clarify that the destruction requirement should apply where information is no longer needed for the purposes of journalism.' However, we submit that the phrase 'no longer needed for the purposes of journalism' is vague, and that OAIC guidance is insufficiently legally binding. All this, however, does not preclude implementing other requirements prescribing that journalists must store notes and records safely and securely.

Notification

We broadly support Proposal 9.5, which contains a modified version of the NDB scheme, in line with the UK approach. On this approach, journalists covered by the journalism exemption need notify only the OAIC, not the individuals involved, of an eligible data breach if the public interest is thus better served. However, we query whether journalists and their employers would be best placed to make such an assessment, given the delicate balancing act involved in weighing up the interest of individuals knowing their privacy has been breached against the interest of journalists eager to refrain from disclosure in order to publish journalism. To simplify the process, journalists could be required in all cases of an eligible breach to notify the OAIC (while redacting identifying information where an individual has been granted anonymity), whereupon the OAIC would then determine whether the journalists ought to notify the individuals involved.

Proposals 11.1, 11.2, 11.3 and 11.4

- **11.1 Amend the definition of consent to provide that it must be voluntary, informed, current, specific, and unambiguous.**
- **11.2 The OAIC could develop guidance on how online services should design consent requests. This guidance could address whether particular layouts, wording or icons could be used when obtaining consent, and how the elements of valid consent should be interpreted in the online context. Consideration could be given to further progressing standardised consents as part of any future APP codes.**
- **11.3 Expressly recognise the ability to withdraw consent, and to do so in a manner as easily as the provision of consent. The withdrawal of consent shall not affect the lawfulness of processing based on consent before its withdrawal.**
- **11.4 Online privacy settings should reflect the privacy by default framework of the Act. APP entities that provide online services should be required to ensure that any privacy settings are clear and easily accessible for service users.**

We strongly support these proposals to improve the consent mechanisms contained in the Act, which will bring it more into line with the GDPR. Consent is a flawed mechanism amid

the unpredictable, complex flows of data online. However, it remains a foundation of ethical practice, and of the legal protection of privacy. In this regard, we note the current legal action by the OAIC against Facebook, following the Cambridge Analytica scandal and the access of data via the This Is Your Digital Life app, alleging substantial breaches of the Act, with consent a key issue.

Proposal 12.1

- **12.1 Amend the Act to require that the collection, use and disclosure of personal information must be fair and reasonable in the circumstances. It should be made clear that the fair and reasonable test is an objective test to be assessed from the perspective of a reasonable person.**

We support this proposal. As one of the authors of this submission has argued elsewhere, the due protection of privacy requires the implementation of overarching general principles, including: respecting consent; fairness and transparency; a prohibition on deception; a prohibition on coercion; and the need to balance privacy against other rights and interests.[5] We have already seen privacy actions succeed on the basis of the ACCC bringing actions against digital platforms including Google for misleading and deceptive conduct;[6] the introduction of a 'fair and reasonable' requirement is a further welcome step in this direction.

Proposal 14.1

- **14.1 Introduce a legislative provision that permits *broad consent* for the purposes of research:**

  (a) Broad consent should be available for all research to which the research exceptions in the Act (and proposed by this chapter) will also apply.

  (b) Broad consent would be given for 'research areas' where it is not practicable to fully identify the purposes of collection, use or disclosure of personal or sensitive information at the point when consent is being obtained.

We strongly support this proposal.

Proposal 18.3

- **18.3 Introduce a right to erasure with the following features:**

  (a) An individual may seek to exercise the right to erasure for any of their personal information.

  (b) An APP entity who has collected the information from a third party or disclosed the information to a third party must inform the individual about the third party and notify the third party of the erasure request unless it is impossible or involves disproportionate effort.

  In addition to the general exceptions, certain limited information should be quarantined rather than erased on request, to ensure that the information remains available for the purposes of law enforcement.

[5] Molitorisz, S. (2020). *Net Privacy: How we can be free in an age of surveillance*. Montreal: McGill-Queen's University Press; Sydney: NewSouth Books.

[6] ACCC (2022), 'Google LLC to pay $60million for misleading representations'. 12 August.

We strongly support this proposal, particularly in light of our arguments that the journalism exemption ought to be retained.

Proposal 26

- **26.1 Amend the Act to allow for a direct right of action in order to permit individuals to apply to the courts for relief in relation to an interference with privacy. The model should incorporate the appropriate design elements discussed in this chapter.**

We support this proposal.

Proposal 27

- **27.1 Introduce a statutory tort for serious invasions of privacy in the form recommended by the ALRC in Report 123.**

  Consult with the states and territories on implementation to ensure a consistent national approach.

We strongly support this proposal, particularly in light of our arguments that the journalism exemption ought to be retained. As recommended in ALRC Report 123, the invasion of privacy must be either by intrusion into seclusion or misuse of private information. As we wrote in our 2020 submission in response to the Issues Paper:

> ... a statutory cause of action for *serious* invasions of privacy is needed. We think it should not to be implemented by way of criminal offence, with the criminal law reserved for appropriate specific matters such as image-based abuse ... We agree with the ALRC's view (expressed in Report 123) that it is preferable for this protection to be developed by way of legislation – which can address more directly the policy objectives associated with evolving technology – rather than through case law.

Proposal 29.3

- **29.3 Establish a Commonwealth, state and territory working group to harmonise privacy laws, focusing on key issues.**

We strongly support this proposal. Privacy law in Australia is piecemeal and haphazard, mixing common law actions such as breach of confidence with Federal law, State/Territory law and council regulation. Meanwhile, technology and media are changing quickly and dramatically, which will necessitate further legal and policy interventions. As much as possible, the law ought to be harmonised and streamlined, so that key issues can be addressed most effectively.