

Submission to Inquiry into the Privacy and Other Legislation Amendment Bill 2024

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Justice and Equity Centre
ABN 77 002 773 524
www.jec.org.au

Gadigal Country
Level 5, 175 Liverpool St
Sydney NSW 2000
Phone + 61 2 8898 6500
Email contact@jec.org.au



About the Justice and Equity Centre

The Justice and Equity Centre is a leading, independent law and policy centre. Established in 1982 as the Public Interest Advocacy Centre (PIAC), we work with people and communities who are experiencing marginalisation or disadvantage.

The Centre tackles injustice and inequality through:

- legal advice and representation, specialising in test cases and strategic casework;
- research, analysis and policy development; and
- advocacy for systems change to deliver social justice.

We actively collaborate and partner in our work and focus on finding practical solutions. We work across five focus areas:

Disability rights: challenging discrimination and making the NDIS fairer to ensure people with disability can participate equally in economic, social, cultural and political life.

Justice for First Nations people: challenging the systems that are causing ongoing harm to First Nations people, including through reforming the child protection system, tackling discriminatory policing and supporting truth-telling.

Homelessness: reducing homelessness and defending the rights of people experiencing homelessness through the Homeless Persons' Legal Service and StreetCare's lived experience advocacy.

Civil rights: defending the rights of people in prisons and detention, including asylum seekers, modernising legal protection against discrimination, raising the age of criminal responsibility to 14, advancing LGBTIQ+ equality and advocating for open and accountable government.

Energy and water justice: working for affordable and sustainable energy and water and promoting a just transition to a zero-carbon energy system.

Contact

Ellen Tilbury
The Justice and Equity Centre
Level 5, 175 Liverpool St
Sydney NSW 2000

T: +61 2 8898 6553
E: etilbury@jec.org.au

Website: www.jec.org.au

The Justice and Equity Centre office is located on the land of the Gadigal of the Eora Nation.

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1. Support for reform

The Justice and Equity Centre (**JEC**) (formerly the Public Interest Advocacy Centre or PIAC) welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Legislation Committee in relation to the Privacy and Other Legislation Amendment Bill 2024 (**the Bill**).

The JEC provided submissions at multiple stages of the Government's lengthy review process examining the *Privacy Act 1988* (Cth) (**Privacy Act**) in 2020, 2021 and 2023.¹

The JEC works with people and communities who are marginalised and facing disadvantage, and helps to change laws, policies and practices that cause injustice and inequality. As part of this work, we have a long history as a strong advocate for the protection of privacy rights of Australians and have contributed to numerous reviews over the past two decades on privacy reform both at federal and state levels. In our work, we have consistently identified significant gaps in the legal framework for the protection of the right to privacy and have repeatedly recommended that a statutory cause of action to protect the right to privacy be enacted.

The JEC welcomes the introduction of the Bill to implement some of the recommendations of the Privacy Act Review Report 2023 (**Review Report**), which would represent the first broad and meaningful reform to the Privacy Act in decades. In particular, we welcome the proposed new statutory tort for serious invasions of privacy contained in Schedule 2 of the Bill which we strongly advocated for throughout the review process. Our submission focuses on important amendments that should be made to improve the utility and efficacy of the statutory tort.

We note that the Bill leaves a number of significant issues unaddressed. We understand the Bill to be only the first tranche of the intended reforms and urge the government to commit to implementing additional reforms without delay. Our submission highlights the need for the following measures as a priority:

- The introduction of an **objective 'fair and reasonable test'** to require that the collection, use and disclosure of personal information must be fair and reasonable in the circumstances.
- Amendments to the **definitions** of 'personal information' and 'collect', and the introduction of a definition of 'consent'.
- The introduction of a **direct right of action** to litigate a claim for breach of privacy under the Privacy Act.

¹ Public Interest Advocacy Centre, *Submission to the Review of the Privacy Act 1988* (November 2020) ('JEC Issues Paper Submission') <https://jec.org.au/wp-content/uploads/2021/01/Submission-re-Review-of-the-Privacy-Act-1988.pdf>; Public Interest Advocacy Centre, *Submission to Discussion Paper on the Review of the Privacy Act 1988* (December 2021) ('JEC Discussion Paper Submission') <https://jec.org.au/wp-content/uploads/2021/12/PIAC-Submission-to-Discussion-Paper-on-the-Review-of-the-Privacy-Act-1988.pdf>; and Public Interest Advocacy Centre, *Privacy Act Review Report Consultation Response* (31 March 2023) ('JEC Review Report Submission'), <https://jec.org.au/wp-content/uploads/2023/04/23.03.31-PIAC-Privacy-Act-Review-Report-submission.pdf>.

2. The new statutory tort

The JEC strongly supports the introduction of a statutory tort for invasion of privacy to address significant gaps in current privacy protection frameworks. Such a cause of action has been recommended numerous times by prior reviews, including by the Australian Law Reform Commission (ALRC) and ACCC, and by the Review Report, and brings Australia into line with other common law jurisdictions.

The JEC supports the tort proposed, largely as recommended by the ALRC in its 2014 report.² We are pleased to see the following features of the proposed new statutory tort align with our recommendations in previous submissions:

- The definition of ‘intrusion on seclusion’ includes physical intrusion into the person’s private space.³ This is important to address scenarios including unreasonable search and seizure, or media harassment.
- The allocation of a cap for damages that parallels the cap in defamation legislation.⁴

2.1 Proposed improvements

We make the following recommendations to improve the new statutory tort.

Vulnerability as a factor in reasonable expectation of privacy

The JEC supports the test of reasonable expectation of privacy and the inclusion of a non-exhaustive list of matters to assist in determining that expectation.⁵ As we have previously recommended,⁶ we suggest the list include the extent to which the plaintiff is in a position of vulnerability. The ALRC recognised vulnerability could both make an invasion of privacy more harmful and sometimes suggest a person or their information should not be intruded upon.⁷ This should be included alongside the other ‘attributes’ of the plaintiff referred in subparagraph 7(5)(c) (‘age, occupation or cultural background’).

Covering negligent invasions of privacy

The tort should not be confined to intentional or reckless invasions of privacy,⁸ but should extend to negligent invasions of privacy, at least in respect of actions against government entities or corporations. Negligent acts may be just as serious for an applicant as deliberate or reckless breaches, and those applicants should also have some recourse. The example we have given in previous submissions of big data breaches continues to be relevant, as more of those breaches come to light – such breaches are unlikely to be ‘intentional’ or ‘reckless’ but may nonetheless result in significant harm to people.⁹ Restricting liability to reckless or intentional acts may also

² ALRC, *Serious Invasions of Privacy in the Digital Era*, Final Report (Report 123, June 2014) (‘ALRC Report’).

³ Clause 6.

⁴ Subclause 11(5).

⁵ Paragraph 7(1)(b) and subclause 7(5).

⁶ See JEC Issues Paper Submission, 16; JEC Review Report Submission, 6.

⁷ ALRC Report, [6.69].

⁸ Paragraph 7(1)(c).

⁹ See JEC Issues Paper Submission, 16; JEC Discussion Paper Submission, 21.

discourage organisations from taking steps to ensure that their privacy management systems are adequate, and may encourage indifference to privacy protection.

The Review Report raised the issue that proof of damage is an essential element of any negligence claim. This would be inconsistent with the proposal for the tort to be actionable without proof of damage. We propose that this could be overcome with appropriate framing of the legislative action in respect of negligent acts, which may require an additional element of damage that would not be necessary for intentional or reckless acts.

Onus of establishing the public interest in privacy should not be placed on applicants

The tort should not require a plaintiff to establish that the public interest in privacy outweighs any countervailing public interest.¹⁰ This places an undue evidentiary burden on applicants and is likely to discourage people from bringing claims. We suggest the balancing of public interests more properly arises when the respondent seeks to rely on a public interest defence.¹¹

For this reason, we propose that 'public interest' be included as a defence under clause 8. This appropriately places the evidentiary burden on respondents, as the party more likely to possess the requisite information or access to information regarding the countervailing public interest. We support the inclusion of the non-exhaustive list of potential public interest considerations in proposed subclause 7(4) and suggest that be retained in the public interest defence.

Exemptions should be limited

The JEC has previously cautioned against wide categories of organisations or types of activities being automatically exempt from the cause of action.¹²

Clause 15 of the Bill would exempt journalists entirely from the operation of the cause of action, without consideration of whether the invasive conduct of the journalist was reasonable or proportionate having regard to the public interest in the relevant journalistic material. The JEC recognises the vital importance of press freedom and the role of journalists, but can also see there may be instances of intrusive conduct by journalists or their assistants that amount to unreasonable invasions of a person's privacy.

An alternative to this very broad exemption would be to include journalism as part of a 'public interest' defence as proposed above. In respect of journalism, this could assume activities of journalists are in the public interest but the assumption can be rebutted in certain circumstances. We suggest this would more appropriately balance the interests of journalistic freedom and protection of privacy than a blanket exemption.

The exemption for law enforcement bodies in clause 16 is also broad and includes a subjective element of 'reasonable belief' in the necessity of the invasion of privacy for the relevant enforcement related activity. This subjective test gives a wide scope to enforcement bodies to intrude upon privacy without sufficient consideration for the necessity or proportionality of the

¹⁰ Subclause 7(3).

¹¹ See JEC Issues Paper Submission, 17; JEC Discussion Paper Submission, 22; JEC Review Report Submission, 9.

¹² See JEC Issues Paper Submission, 17; JEC Discussion Paper Submission, 23.

invasive conduct. The JEC is aware from our work of the disproportionate application of law enforcement activities to marginalised groups, including First Nations people and socially disadvantaged young people, and we are concerned the breadth of this exemption denies people access to important accountability measures for the conduct of law enforcement bodies.

The JEC suggests the exemption should be limited by removing the subjective element of 'reasonable belief'. We also suggest that only enforcement activity that is 'lawful' be covered by the exemption, so that a purported exercise of power that results in a serious invasion of privacy is not excluded from the scope of the tort. We propose that clause 16 should simply provide that the Schedule does not apply to an invasion of privacy by an enforcement body if it is 'reasonably necessary for one or more lawful enforcement related activities'.

3. Additional reform urgently needed

The amendments proposed by the Bill represent an important first step in updating the privacy framework, but additional reform is urgently needed to make the framework fit for purpose in an age of digital transformation. The Government's response to the Review Report agreed or agreed in principle to close to 100 recommendations for reform, but the current Bill implements only a fraction of those and does not address many of the substantive changes necessary to modernise the Act for the digital age. While we support passage of the Bill (subject to our comments in this submission), we urge the Government to prioritise the further reforms it has agreed to. Our previous submissions detail our views on those reforms, but below we highlight some of the most urgent issues that should be addressed as soon as possible.

3.1 Fair and reasonable test

The current privacy framework places the onus on individuals to self-manage their privacy. As outlined in previous submissions,¹³ the JEC supports the introduction of a requirement in the Privacy Act that the collection, use and disclosure of personal information must be fair and reasonable in the circumstances (proposal 12.1 of the Review Report). This would mean that the burden of managing privacy risks would be shared through clear obligations on APP entities, rather than placing the onus overwhelmingly on individuals.

3.2 Modernising definitions

Definitions in the Privacy Act must be modernised to reflect the realities of data gathering and use which now occurs in a much broader range of circumstances and by many more actors than ever before. This includes:

Definitions of 'personal information' and 'collect'

As outlined in previous submissions,¹⁴ the definition of personal information should be updated to make it clearer that technical and inferred information can be personal information (proposals 4.1

¹³ JEC Discussion Paper Submission, 11-12; JEC Review Report Submission, 5-6.

¹⁴ JEC Issues Paper Submission, 5-6; JEC Discussion Paper Submission, 7-8; JEC Review Report Submission, 3.

and 4.2 of the Review Report). Similarly, the definition of ‘collect’ needs to be amended to expressly cover information obtained from any source and by any means, including inferred or generated information (proposal 4.3 of the Review Report).

Definition of ‘consent’

As outlined in previous submissions,¹⁵ the JEC supports amending the definition of consent to specify that it is ‘voluntary, informed, current, specific and an unambiguous indication through clear action’ (as recommended in proposal 11.1 of the Review Report but incorporating the element of ‘unambiguous indication through clear action’ to make clear the need for affirmative action to indicate consent).

3.3 Direct right of action

As outlined in previous submissions,¹⁶ the JEC continues to strongly support the introduction of a direct right of action to pursue a claim for breach of privacy under the Privacy Act (proposal 26.1 of the Review Report). The current process for individuals seeking to enforce their rights under the Privacy Act is clumsy and provides limited recourse. The introduction of the statutory tort proposed in the Bill addresses only serious and intentional invasions of privacy, whereas a direct action under the Act would provide a clear and simple mechanism for people to remedy most instances of misuse of personal information. We welcome the new monitoring, compliance and inquiry powers the Bill provides to the Privacy Commissioner, and the new civil penalty provisions, but these do not provide people who have experienced the consequences of a privacy breach with direct recourse.

Such a right of action should be available to any individual or group whose privacy has been interfered with by an APP entity, and applicants should be able to elect between seeking conciliation through the OAIC or applying directly to the courts.

¹⁵ JEC Issues Paper Submission, 7-8; JEC Discussion Paper Submission, 9-10; JEC Review Report Submission, 4.

¹⁶ JEC Issues Paper Submission, 8-11; JEC Discussion Paper Submission, 14-19; JEC Review Report Submission, 7.