

10 April 2024

Ms Dianne Orr
Assistant Secretary
Information Law Branch
Attorney-General's Department
3–5 National Circuit
BARTON ACT 2600

By email: doxxing@ag.gov.au

Dear Ms Orr

Doxxing and privacy reforms

1. The Law Council of Australia is pleased to make a submission to the Attorney-General's Department in response to its public consultation on doxxing and privacy reforms. We are grateful for the assistance of the Law Society of New South Wales, the Queensland Law Society, and the Law Institute of Victoria in preparing this submission, in addition to our Business Law Section's Privacy Law Committee.
2. The Department has sought responses to the following questions:
 - (a) Do you think existing measures are sufficient to deal with doxxing?
 - (b) Do you think that a proposed statutory tort for serious invasions of privacy would improve the available options for individuals who have fallen victim to doxxing by enabling them to seek redress through the courts?
 - (c) Do you have any suggestions for other options (legislative or non-legislative) to respond to doxxing?
3. Due to the interrelationship between the consultation questions, this submission will not respond to each question separately. Instead, our remarks below will canvass the key issues that the Department seeks to address.

General comments

4. The Law Council emphasises that, whilst there is a need for an overarching legal framework to manage 'doxxing' and especially to address the non-consensual public revelation of personal private information with the intention to cause harm, there are instances in which doxxing behaviour is legitimate and should not be circumscribed. For example, doxxing can be part of public interest journalism where it involves the unveiling of private information that exposes contradictory, unethical, or illegal behaviour by public officials or business people.¹

¹ eSafety Commissioner, 'Doxing trends and challenges – position statement' (Position Statement, 23 January 2022) 2 <https://www.esafety.gov.au/sites/default/files/2022-01/Doxing-PositionStatement%20_v2.pdf>.

5. Consequently, any regulatory framework designed to address doxxing must reflect a very careful balance between addressing the unacceptable harm to individuals caused by illegitimate doxxing behaviours, and ensuring that legitimate instances of information publication are not prevented.

Review of the *Privacy Act 1988* (Cth)

6. The Law Council has long supported a holistic approach to privacy and data law reform that promotes, to the greatest extent, consistency and predictability in the relevant legislative frameworks. In this regard, we have repeatedly called for the review of the *Privacy Act*—and any subsequent reforms—to be advanced as a matter of priority, being the primary and authoritative source of privacy law in Australia.²
7. To the extent that it may be considered a ‘serious invasion of privacy’, doxxing should be considered in the context of Proposal 27.1 of the *Privacy Act Review Report* (the **Privacy Report**), which recommended that:³
 - a statutory tort be introduced for serious invasions of privacy, in the form recommended by the Australian Law Reform Commission (**ALRC**) in Report 123;⁴ and
 - that the Government consult with the states and territories on implementation to ensure a consistent national approach.
8. In the Law Council’s submission to the Department in April 2023 to inform the Government response to the *Privacy Report*, we acknowledged that there are diverse views within the legal profession on the introduction of a statutory tort for serious invasions of privacy.⁵ However, on balance, and having regard to developing international jurisprudence in this area,⁶ we provided in-principle support for the introduction of a statutory tort, in the form recommended by the ALRC, and on the condition that there are sufficiently high thresholds in place to ensure actions are limited to serious invasions of privacy.⁷

² See, eg, Law Council of Australia, *Privacy Legislation Amendment (Enforcement and Other Measures) Bill 2022* (Submission to the Senate Legal and Constitutional Affairs Committee, 8 November 2022) <<https://lawcouncil.au/resources/submissions/privacy-legislation-amendment-enforcement-and-other-measures-bill-2022>>; Law Council of Australia, *Government response to the Privacy Act Review Report* (Submission to the Attorney-General’s Department, 13 April 2023) <<https://lawcouncil.au/resources/submissions/government-response-to-the-privacy-act-review-report>>.

³ Attorney-General’s Department, *Privacy Act Review Report* (February 2023) <https://www.ag.gov.au/sites/default/files/2023-02/privacy-act-review-report_0.pdf> 281-287.

⁴ Attorney-General’s Department, *Privacy Act Review Report* (February 2023) <https://www.ag.gov.au/sites/default/files/2023-02/privacy-act-review-report_0.pdf> 281-287.

⁵ *Government response to the Privacy Act Review Report* (Submission to the Attorney-General’s Department, 13 April 2023) <<https://lawcouncil.au/resources/submissions/government-response-to-the-privacy-act-review-report>> 39.

⁶ See, eg, *Lloyd v Gogle* [2021] UKSC 50.

⁷ *Government response to the Privacy Act Review Report* (Submission to the Attorney-General’s Department, 13 April 2023) <<https://lawcouncil.au/resources/submissions/government-response-to-the-privacy-act-review-report>> 39.

9. In our submission to the Department, we further remarked that:

... given the need for further detailed consultation on the model and scope of the tort, which will be very important to get right, the Law Council considers that the introduction of a statutory tort for serious invasions of privacy may be most appropriately progressed through a subsequent tranche of reforms to Australia's privacy regime, as opposed to being included in any first tranche.⁸

10. In September 2023, the Australian Government provided 'in-principle' agreement to most of the proposals in the Privacy Report, including Proposal 27.1.⁹ The Government stated that the invasion of privacy would need to be either a serious intrusion into seclusion, or a serious misuse of private information.¹⁰ In addition, a plaintiff bringing a cause of action should be required to provide:

- the privacy invasion was serious;
- they had a reasonable expectation of privacy;
- that the invasion was committed intentionally or recklessly (not merely negligently); and
- the public interest in privacy outweighed any countervailing public interest.¹¹

11. The Government's in-principle support for the introduction of a statutory tort, in the form recommended by the ALRC, is a welcome development and if implemented would be a meaningful step toward facilitating legal recourse for victims of doxxing. It is critical that momentum in this area is maintained to avoid uncertainty and unintended consequences created by a piecemeal approach to reform.

12. To achieve this, we understand that the pursuit of enhanced privacy protections for individuals under the Privacy Act, combined with education and awareness programs, are likely to be the most appropriate response to behaviours such as doxxing. However, further consideration will need to be given to the application of any such response to an Australian Privacy Principles entity, and the scope of the statutory tort where the behaviour/offending conduct is that of an individual or an otherwise exempt organisation (e.g. a small business as currently defined).

13. A further consideration about the effectiveness of responding to doxxing through a statutory tort is the identification of the proper respondent. In the online space it can be particularly difficult to identify the alleged perpetrator, so there may need to be appropriate provisions to enable preliminary discovery, for example against a social media platform, internet service provider or website hosting provider to identify the correct respondent.

14. Importantly, the creation of a tort for serious invasions of privacy alone is unlikely to respond to doxxing effectively in the absence of other legal and non-legal supports, and we remain conscious that a statutory tort may only be practically available for those with resources to enforce it. This highlights the important roles of the Office of the Australian Information Commissioner and the eSafety Commissioner in responding to concerns

⁸ Ibid 40.

⁹ Australian Government, *Government Response: Privacy Act Review Report* (September 2023) <<https://www.ag.gov.au/sites/default/files/2023-09/government-response-privacy-act-review-report.PDF>> 19, 36.

¹⁰ Ibid 19.

¹¹ Ibid.

such as those arising from doxxing, noting that the remedy sought will quite often be a takedown or apology rather than damages or monetary compensation.

15. The Law Council reiterates its call for careful and considered consultation of any draft legislation introducing a statutory tort and other reforms designed to strengthen individual protection, to ensure that measures reflect community expectations and that the courts are empowered to weigh up the public interest in privacy against any other countervailing interests that may arise.

Avoiding fragmentation

16. As noted above, measures to address doxxing should be considered as part of an holistic consideration of privacy protections for individuals, rather than a discrete issue requiring a targeted legislative response. Developing a bespoke regulatory response to doxxing risks further fragmentation in the privacy framework, and the focus should remain on an improvement of the protection afforded to individuals in the ecosystem generally.
17. We acknowledge that the issue of doxxing has received significant media attention recently,¹² and we also appreciate that, as identified by the eSafety Commissioner, doxxing can leave targets vulnerable to—and fearful of—public embarrassment, discrimination, stalking, identity theft, financial fraud, and damage to their personal and professional reputation.¹³
18. However, the term ‘doxxing’ is not mentioned in the Privacy Report, and it has not been subject to the same level of scrutiny that has been undertaken by the Department about Proposal 27.1, and reforms to the Privacy Act more generally. Moreover, while we acknowledge the legitimate and serious harms that can arise from the practice of doxxing, caution should be exercised if there is to be a reactive approach to privacy reform that prioritises doxxing over the broader areas identified for urgent reform in the comprehensive Privacy Report. We reiterate our calls for a roadmap for the harmonisation of Australia’s privacy and data laws, to ensure the development of a national privacy framework that is consistent, clear, and accessible.¹⁴

Definition of doxxing

19. The Department’s consultation appears to employ the eSafety Commissioner’s definition of doxing: “the intentional online exposure of an individual’s identity, private information, or personal details without their consent”.¹⁵
20. As set out above, the Law Council’s preliminary view is that some doxxing activities could be capable of being dealt with under the rubric of Proposal 27.1 from the ALRC,

¹² See, eg., Josh Taylor, *Publication of Jewish creatives WhatsApp group led to death threats, MP says*, The Guardian (Online, 9 February 2024) <<https://www.theguardian.com/australia-news/2024/feb/09/josh-burns-jewish-whatsapp-group-channel-publication-israel-palestine-clementine-ford>>; David Crowe, *‘Doxxing’ laws to be brought forward after Jewish WhatsApp leak*, The Sydney Morning Herald (Online, 12 February 2024) <<https://www.smh.com.au/politics/federal/doxxing-laws-to-be-brought-forward-after-jewish-whatsapp-leak-20240212-p5f4cc.html>>; Lisa Visentin, *Doxxers on notice they will face jail time under new laws*, The Sydney Morning Herald (Online, 18 February 2024) <<https://www.smh.com.au/politics/federal/doxxers-on-notice-they-will-face-jail-time-under-new-laws-20240216-p5f5ha.html>>.

¹³ Australian Government, eSafety Commissioner, *Doxing* (Web Page, March 2024) <<https://www.esafety.gov.au/industry/tech-trends-and-challenges/doxing>>.

¹⁴ Law Council of Australia, *Privacy Legislation Amendment (Enforcement and Other Measures) Bill 2022* (Submission to the Senate Legal and Constitutional Affairs Committee, 8 November 2022) <<https://lawcouncil.au/resources/submissions/privacy-legislation-amendment-enforcement-and-other-measures-bill-2022>> 8.

¹⁵ Australian Government, eSafety Commissioner, *Doxing* (Web Page, March 2024) <<https://www.esafety.gov.au/industry/tech-trends-and-challenges/doxing>>.

supported by other legal and non-legal measures. Nonetheless, if specific reference to doxxing were to be introduced in legislative responses we suggest that—at a minimum—the term would need to be narrowly defined to avoid a variety of innocent interactions from being captured under the current definition. For example, it is not clear from the eSafety Commissioner’s definition of doxxing whether ‘online exposure’ requires disclosure to a large audience, or whether private discussions amongst friends in a closed online conversation would be sufficient.

21. An overly-broad definition risks a chilling effect on disclosures that are in the public interest. As such, consideration would need to be given to employing a harm-based approach to inform the definition of doxxing, which should be weighed against factors such as engagement in legitimate public discourse.

Adequacy of existing measures

22. Further clarity on the definition of doxxing would help ascertain the extent to which other laws and regimes—including processes under the eSafety Commissioner’s purview—are adequate to address the relevant harms associated with doxxing. Having regard to the relatively limited information provided in the course of this consultation, it is possible that several existing laws at the State, Territory and Commonwealth level already apply, including:
 - using a carriage service to menace or harass;¹⁶
 - vilification and other serious hate crime laws;¹⁷
 - workplace laws relating to discrimination, harassment and bullying;
 - defamation law;
 - offences relating to malicious cyber activity;¹⁸ and
 - domestic violence and coercive control legislation.¹⁹
23. The inclusion of both civil and criminal frameworks in the above list highlights the Privacy Act regime’s focus on information rights, whereas doxxing appears to engage a broader set of rights and harms. It is unclear to the Law Council whether a legislative imperative exists for specific anti-doxxing laws, noting that an adequate response may require drawing on both civil and criminal law (where gaps are identified).
24. Additionally, the ability to seek redress is further complicated by the fact that doxxing often involves the use of information obtained from publicly accessible sources. Given the potential overlap of other existing legislative frameworks, we suggest that further detail is required to clarify the specific conduct that is proposed to be targeted, as well as the specific harms to be addressed.
25. The Law Council reiterates the view that further education is needed to inform the community on the harms associated with doxxing. Emphasis should be placed on the importance of limiting public disclosure of personal information online, not only the information of individuals but also the information of groups of individuals.

¹⁶ *Criminal Code Act 1995* (Cth) s 474.17.

¹⁷ Eg., *Racial Discrimination Act 1975* (Cth).

¹⁸ *Autonomous Sanctions Act 2011* (Cth) s 3(3)(c).

¹⁹ Eg., amendments introduced in New South Wales by the *Crimes Legislation Amendment (Coercive Control Act) 2022* (NSW) and in Queensland by the *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Act 2024* (Qld).

26. Furthermore, the Law Council supports ongoing measures that emphasise the need for stricter controls on the collection, usage, storage, and display of personal information, especially when it is deemed unnecessary for a particular online service or activity. This approach adds additional safeguards and will help individuals protect their private details from unwarranted disclosure.

Contact

27. If the Law Council can be of further assistance to the Department, please contact Mr Nathan MacDonald, Deputy General Manager, Policy on (02) 6246 3721 or at nathan.macdonald@lawcouncil.au.

Yours sincerely

A handwritten signature in grey ink, appearing to be 'GM', is positioned above the typed name.

Greg McIntyre SC
President