



31 March 2023

Attorney-General's Department
Australian Government
3-5 National Circuit
BARTON ACT 2600

Submitted via: privacyactreview@ag.gov.au

Arts Law Centre of Australia Submission

Re: Privacy Act Review Report

The Arts Law Centre of Australia (**Arts Law**) is a national community legal centre providing free or low-cost legal advice to creators residing in all Australian states and territories. Arts Law makes this submission on behalf of our broad client base and, in particular, creators and the peak or professional organisations which represent their interests. Arts Law assists thousands of Australian artists and organisations annually. Artists in the Black (**AITB**) is a specialist program at Arts Law that provides advice and information on legal issues for Aboriginal and Torres Strait Islander artists and communities.

Arts Law works nationally to support the broad interests of artistic creators, the vast majority of whom are emerging or developing artists, and the organisations which support them. Our clients reside not only in metropolitan centres, but also in regional, rural and remote parts of Australia. Arts Law provides expert legal and business advice, publications, education and advocacy services to more than 4,000 Australian artists and arts organisations operating across the arts and entertainment industries.

Arts Law makes this submission on behalf of our wide client base, many of whom operate as small businesses, including those who practice as:

- visual artists including photographers
- authors including journalists
- film makers, including documentary film makers
- arts organisations, and
- peak or professional organisations which represent the interests of the above clients.

Arts Law would like to acknowledge the Traditional Owners of the various lands on which Arts Law works and pay our respects to Elders past, present and emerging.

Arts Law will address five of the proposals raised in the Privacy Act Review Report which relate to our clients (**Report**).



1. Summary of Arts Law's position

Arts Law supports Proposal 3 to amend the objects of the *Privacy Act 1988* (Cth) (**Privacy Act**)

Arts Law supports some of the proposals set out in Proposal 4 to provide greater clarity in relation to personal information, de-identification and sensitive information.

Arts Law opposes Proposal 6, the amendment to the small business exemption. Removal of this exemption in its entirety will impose an onerous burden on small businesses where the personal information obtained is limited in scope. If the exemption is to be amended, we propose it be reduced so that the exemption remains for businesses with a turnover of \$1 million or less.

Arts Law opposes Proposal 9, the amendment to the journalism exemption but supports the implementation of an industry privacy code or standard for media organisations.

Arts Law opposes Proposal 25, the introduction of a statutory tort for serious invasions of privacy.

2. Amendment to Objects of Privacy Act (Proposal 3)

Arts Law supports proposals 3.1 and 3.2 to amend the objects of the Privacy Act to make it clear that:

- a. The Privacy Act is concerned with the protection of personal information (Proposal 3.1).
- b. The objects of the Privacy Act are to protect the public interest (Proposal 3.2).

We further support the expansion of the definition of personal information to thereby extend the range of potential risks for breach.

3. Personal information, de-identification and sensitive information (Proposal 4)

Arts Law supports Proposal 4 to:

- a. Clarify the definition of personal information to provide greater clarity regarding when there is a connection between the information and the individual, and to include a non-exhaustive list of information that may be personal information, and specific examples in the explanatory material and the Office of the Australian Information Commissioner (**OAIC**) guidelines, to assist APP entities to identify the types of information that could fall within the definition (Proposals 4.1 and 4.2).
- b. Amend the definition of 'collects' to expressly cover information obtained from any source and by any means, including inferred or generated information (Proposal 4.3).
- c. Amend to ensure that 'Reasonably identifiable' is supported by a non-exhaustive list of circumstances to which APP entities will be expected to have regard in their assessment (Proposal 4.4).
- d. Amend the definition of 'de-identified' to make it clear that de-identification is a process, informed by best available practice, applied to personal information that involves treating it in such a way such that no individual is identified or reasonably identifiable in the current context (Proposal 4.5).



If the Privacy Act applies to our clients, these proposals will provide greater clarity to our clients in relation to the application of the Privacy Act.

4. Small Business Exemption (Proposal 6)

Arts Law is concerned about the imposition of bureaucratic and administrative requirements on individual arts practitioners, small arts businesses and small arts organisations if the small business exemption is removed. While they may already have some form of voluntary privacy policy in place, a statutory requirement and attendant formalities will be onerous for many small businesses without the resources to manage these requirements.

The cost of obtaining legal advice in relation to the application of the Privacy Act and compliance with the Privacy Act needs to be balanced against the benefits of ensuring that personal information is kept secure in all contexts and, if there is a data breach, that affected individuals are informed. These are two key elements of the proposed reform to dispense with the small business exemption which are designed to strengthen the security of personal information and ensure individuals are aware of any potential breach of their privacy.

Law reform involves an assessment of the degree of risk and the law is designed to manage or minimise that risk to ensure protection for the greatest number of people without imposing restrictions on behaviour that may not be justified in the circumstances or are not commensurate with the risk. The extent of the impact of a breach of privacy by a small business is comparatively limited relative to large business because they deal with a smaller client base and supply chain and hold a smaller volume of information. The scope of personal information held by the small business is also likely to be limited.

Business size is likely to correlate to volume and extent of personal information obtained and retained. According to the Bureau of Statistics there were 140,102 businesses in Australia in 2022 who did not have any employees. There were 728,759 businesses who had between 1 and 4 employees. These businesses would be the hardest hit by the application of the Privacy Act to small businesses because of the limited resources available to them to address regulatory requirements.

The nature of the business will correlate to the volume and extent of personal information obtained and retained. Businesses in the arts sector do not commonly obtain detailed personal information from clients. Many small arts organisations, such as sole traders or small partnerships, like a puppet theatre company or musician or designer, have very low incomes and few staff and, more importantly, limited information is obtained from their clients other than the name, email address and telephone number. Most personal information is not relevant to their business.

If the government amends this exemption, we suggest the following:

- a. That the exemption be reduced but not completely disposed of, so that businesses with an annual turnover of less than \$1 million remain exempt. A reduction in the turnover threshold would balance the risks associated with the increase in personal information now being stored online and in the cloud by businesses while not imposing harsh regulations on small businesses where little personal information is retained.



- b. It is reasonable to require that if information regarding a client's financial details or identity documents are obtained by a small business, they should not be retained. It is unreasonable to impose onerous reporting requirements on small businesses who do not have access to their client's personal information other than basic contact details. Deletion of personal information other than name and contact details would serve to limit the increased risk occasioned by all businesses, regardless of size, increasingly retaining information about their clients online.
- c. Small exempt businesses could be required to submit a brief annual report (based on a pro forma document) setting out what information they have obtained from their clients and confirming that financial details have been deleted within a regulated period say 14 days from the date of the final payment transaction.
- d. Small businesses should be required to report on a notifiable data breach of the businesses' records (both physical and electronic).
- e. Alternatively, if the Privacy Act is to apply to all businesses, regardless of turnover, there should be additional criteria by which certain small businesses remain exempt. For example, if they do not obtain, or retain online, personal information, other than the name and contact details of the persons concerned.
- f. If small businesses under a certain turnover, such as \$1 million, are to be subject to the Privacy Act, they should have access to a simplified reporting procedure such as a pro forma privacy policy, a simpler more straightforward version of the template of the Information Commissioner's Office and be part of a fast track lane of reporting to the regulator.

There should be no limitations on the application of the Privacy Act to those businesses, regardless of size, which gather personal information about members of the public beyond essential details such as name and contact details, so that any business which retains information like credit card details, gender and date of birth, or trades in personal information, should be subject to the Privacy Act. This would be an expansion of the categories of business which are exceptions to the small business exemption such as those identified in the Report at paragraph 6.4.

Disclosure of personal information to third parties should be strictly limited by the Privacy Act, regardless of the size of the business, and details of the processes and reasons should be closely regulated.

All businesses, regardless of size, should be subject to the following:

- a. Limited to obtaining data that is essential for the operation of the core business. This would serve to limit the increased risk occasioned by businesses increasingly retaining information about clients online.
- b. Data breach provisions should apply to all businesses, and they should be required to report a notifiable data breach and notify the individuals concerned within statutory time limits.

If such an amendment is to be introduced and the small business exemption removed in its entirety or in some abbreviated way, we strongly support the suggested consultation process with small and medium business to assess their capacity and needs to respond to such an amendment.



If the amendments in Proposal 6 are introduced, increased resources should be provided to Arts Law to ensure that small businesses in the arts community are able to access free or low cost privacy legal advice, and to other community legal centres and other organisations such as Justice Connect to ensure that small businesses generally are able to access privacy legal advice. This could involve Arts Law being involved in the suggested consultation process so that it can be well informed about the legislative requirements to ensure these can be effectively conveyed to our clients and incorporated into our resource and education materials.

5. Journalism Exemption (Proposal 9)

Arts Law supports the retention of the journalism exemption for media organisations who have publicly endorsed privacy standards set out in codes or standards of practice provided those standards have been complied with by the media organisation.

Our submission on this issue is based on ensuring freedom of expression and information is maintained. Freedom of expression and information are a cornerstone of democracy and should be preserved and not eroded. It is an important civil liberty to retain and supports public interest journalism in Australia.

The broad range of codes of practice and standards of practice presently within the media industry is unwieldy. Introduction of an industry code would regularise those standards to ensure they are objectively rigorous and make it easier for the public and any potential complainants to understand the privacy standards and how they apply to all media organisations and to set standardised complaints-handling procedures. Under the industry standard, complaints could be handled by one organisation, for example by either OAIC, Australian Communications and Media Authority (ACMA) or Australian Press Council (APC), to ensure continuity of approach to the allegations and testing of the application of the industry standard.

Arts Law welcomes the proposal of a review of the operation of the journalism exemption from the perspective of auditing complaints of alleged privacy breaches and assessment of the effectiveness of the complaint handling processes. Such a review would be for the purpose of leading to recommendations as to the provisions of an industry code of practice.

6. A Statutory Tort for Serious Invasions of Privacy (Proposal 27)

Arts Law is of the view that a statutory tort has the likelihood of negatively impacting and impeding freedom of speech and information and some forms of artistic expression and these risks outweigh the benefit of introducing a tort for serious invasions of privacy.

There are specific behaviours causing serious harm that could best be regulated by statute such as intentional or reckless misuse of private information or 'intrusion into seclusion'. If they are not already curtailed by the law, legislative reform can occur within existing laws rather than a broader single privacy tort that may be stretched more broadly.

While we agree with the ALRC Report 123 that requires the plaintiff to show that the public interest in privacy outweighs the public interest in freedom of speech and artistic expression, the parties would need to be involved in court proceedings to reach this conclusion, which would be a costly exercise and would be limited to those who litigate. As such we do not support any amendment to this effect.



7. Conclusion

Any amendments to the law concerning privacy must come with sufficient resources for the regulators to be able to properly investigate and prosecute.

Arts Law agrees to publication of the submission. We appreciate the opportunity to make these submissions and welcome any further discussion and consultation. Please contact Arts Law by email to artslaw@artslaw.com.au or (02) 9356 2566 if you would like us to expand on any aspect of this submission, verbally or in writing.

Yours faithfully,

A handwritten signature in black ink, appearing to read "Robyn Ayres".

Robyn Ayres
CEO, Arts Law

A handwritten signature in black ink, appearing to read "Donna Robinson".

Donna Robinson
Senior Solicitor, Arts Law