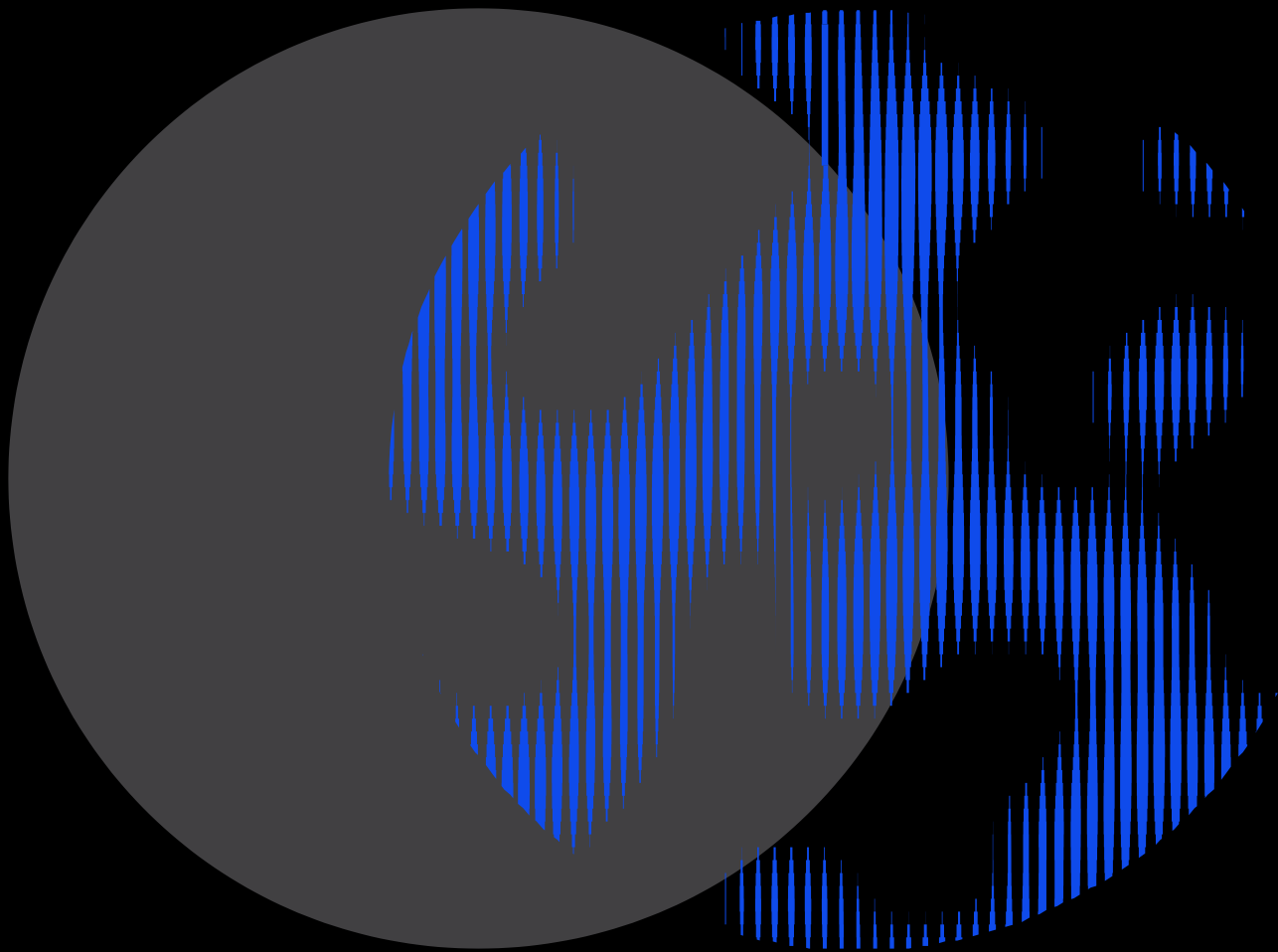




**Human Technology
Institute**



Consultation on doxxing and privacy reforms

Submission to the Attorney-General's Department, 28 March 2024

About the Human Technology Institute

The Human Technology Institute (HTI) is building a future that applies human values to new technology. HTI embodies the strategic vision of the University of Technology Sydney (UTS) to be a leading public university of technology, recognised for its global impact specifically in the responsible development, use and regulation of technology. HTI is an authoritative voice in Australia and internationally on human-centred technology. HTI works with communities and organisations to develop skills, tools and policy that ensure new and emerging technologies are safe, fair and inclusive and do not replicate and entrench existing inequalities.

The work of HTI is informed by a multi-disciplinary approach with expertise in data science, law and governance, policy and human rights.

For more information, contact us at hti@uts.edu.au

Acknowledgement of Country

UTS acknowledges the Gadigal people of the Eora Nation, the Booroberongal people of the Dharug Nation, the Bidiagal people and the Gamaygal people upon whose ancestral lands our university stands. We would also like to pay respect to the Elders both past and present, acknowledging them as the traditional custodians of knowledge for these lands.

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Introduction

The Human Technology Institute (**HTI**) welcomes the opportunity to submit to the Attorney-General's Department (**AGD**) consultation on proposed reform of the *Privacy Act 1988* (Cth) (the **Privacy Act**) to address the issue of 'doxxing'.

In this consultation process, the AGD defined 'doxxing' as 'the intentional online exposure of an individual's identity, private information or personal details without their consent'.¹ HTI observes that the practice of doxxing can breach an individual's right to privacy as recognised under international human rights law. Yet the Privacy Act does not presently address this problem effectively, and so it is likely that victims of doxxing, whose right to privacy has been infringed, will not be adequately protected under current Australian law.

Reform of the Privacy Act is long overdue. This is made even more urgent by the rise of a range of technologies that rely on vast quantities of personal information, and which have led to an unprecedented scope and scale of collection, use, communication and storage of personal information. Moreover, these data-hungry technologies are continuing to develop and grow, and so the deficiencies in the Privacy Act are creating an ever-larger problem for the Australian community and broader economy.

In February 2023, the Government released a major review of the Privacy Act (**AGD Privacy Act Review**), and in September 2023 the Government committed to implement the majority of the reforms proposed by that Review. HTI has previously welcomed the recommendations of the AGD Privacy Act review, and has endorsed the Government's commitment to introduce legislative reform.²

In this short submission, HTI again outlines its support for the implementation of the recommendations outlined in the Privacy Act Review. Regarding the specific question of doxxing, HTI considers the Privacy Act Review proposals identified in this consultation would adequately address the issue of doxxing in civil law.

Selecting the most appropriate regulatory object to address the problem of doxxing

There are two alternative ways in which the Government might choose to address the problem of doxxing. The first option would be to make doxxing the object of regulation. This would involve introducing a legislative definition of doxxing, and to prohibit activity that falls within the scope of that definition, with appropriate exceptions as deemed necessary.

The second option would involve the relevant legislative prohibition to be drafted more broadly, without explicit reference to doxxing. In other words, under this second option, doxxing would not be the regulatory object, in that the legislation would not include a specific definition of doxxing, nor would the prohibition expressly refer to doxxing by name. Instead, the problem of doxxing would be addressed via more general legislative provisions, especially targeting serious invasions of privacy. Gauging whether the legislation effectively addresses the problem of doxxing would involve a careful assessment of whether activities that meet the non-statutory definition outlined by the AGD, and referred to above, are likely to fall within the scope of the broad legislative

¹ Attorney-General's Department, *Public consultation on doxxing and privacy reforms* (11 March 2024), <https://consultations.ag.gov.au/integrity/doxxing-and-privacy-reforms/>.

² See: Human Technology Institute, *Submission to the Privacy Act Review Report consultation* (March 2023), https://www.uts.edu.au/sites/default/files/2023-04/23_04_04%20-%20HTI%20submission%20to%20the%20Privacy%20Act%20Review%20Report.pdf;

Human Technology Institute, 'Reform to Australia's privacy laws takes a step forward' (Web Story) 28 September 2023.

prohibition of serious invasion of privacy, and other such general, privacy-protective provisions.

Based on the material released by the AGD for the purpose of this consultation process, it appears that the Government proposes to address the problem of doxxing via the second of the above two reform approaches. HTI supports that reform approach, and cautions against the alternative approach (whereby doxxing would be an express regulatory object).

This observation is based on the AGD proposing the following reforms to address doxxing:

- a new statutory tort for serious invasions of privacy (Privacy Act Review Proposal 27.1)
- giving individuals greater control and transparency over their personal information, including the introduction of new or strengthened individual rights to access, object, erase, correct, and de index their personal information (Privacy Act Review Proposals 18.1-18.6)
- progressing other privacy reform proposals contained in the Privacy Act Review that bring the Privacy Act into the digital age, uplift protections, and raise awareness of obligations for responsible personal information handling.

Reliance on a statutory tort to address the problem of doxxing

As noted above, it appears that the principal new protection against doxxing is proposed to be the introduction of a statutory tort for serious invasions of privacy. The Australian Law Reform Commission (**ALRC**) provided a detailed model for a statutory tort for serious invasions of privacy in its 2014 report on *Serious Invasions of Privacy in the Digital Age* (see below).³ This model was subsequently supported in the Privacy Act Review.⁴

Under this model, the statutory tort would apply to invasions of privacy that are serious, committed intentionally or recklessly and cannot be justified in the public interest. It would cover misuse of private information, in circumstances where the individual had a reasonable expectation of privacy.

When determining whether an invasion of privacy is 'serious', a court would be prompted to consider 'the degree of any offence, distress or harm to dignity' caused; and whether 'the defendant was motivated by malice or knew the invasion of privacy was likely to offend, distress or harm the dignity of the plaintiff', among other considerations.⁵

The invasion of privacy would not be restricted to those that cause monetary damages – damages for emotional distress would be available. The tort would include a number of defences – for example where the actions of the defendant were authorised by law.⁶

³ For full disclosure, one of the authors of this submission, Edward Santow, served on the ALRC's advisory committee for that review.

⁴ Attorney-General's Department, *Privacy Act Review Report* (February 2023) 15, Proposal 26.1.

⁵ Australian Law Reform Commission *Serious Invasions of Privacy in the Digital Era* (ALRC Report 123) (June, 2014), Rec 8.1.

⁶ Australian Law Reform Commission *Serious Invasions of Privacy in the Digital Era* (ALRC Report 123) (June, 2014), 'Executive Summary'.

Will the proposed reforms address doxxing?

The proposed statutory tort for serious invasions of privacy would create a cause of action for individuals who experience a serious invasion of privacy, addressing a significant gap in our civil law.

HTI considers the statutory tort for serious invasions of privacy proposed by the ALRC would extend to instances of doxxing that meet the definition and types of doxxing outlined by Government—the intentional online exposure of individual’s identity, private information or personal details without their consent—where it reaches a level of seriousness (understood as likely to result in offence, distress or harm, and/or involving malice). It would take into account legitimate public interests, such as freedom of expression and freedom of the press, and relevant defences.

There would be no need to incorporate the definition of doxxing into the statutory tort itself, or to create a statutory definition of doxxing elsewhere in the Privacy Act, to achieve this coverage and outcome.

The other proposed reforms, including rights to access or erase personal information, would support those who have experienced doxxing to remove their private information from online platforms and enforce their rights in relation to the use of their personal data more broadly. All three of the proposed reforms together would improve people’s understanding of privacy rights and responsibilities, empower them to exercise their rights and seek redress, and deter the practice of doxxing.

Outstanding privacy reforms

The proposed reforms outlined in this consultation are already well-researched and have been the subject of extensive stakeholder and broader community consultation through the Privacy Act Review process, and via the ALRC in relation to the statutory tort. This specific recommendation has awaited implementation for at least a decade, noting that other government-initiated reviews have previously made similar recommendations.

HTI strongly recommends that these reforms be implemented and reiterates the importance of implementing all the Privacy Act Review recommendations in full. These reforms will not only address doxxing, but also ensure better protection of Australians’ right to privacy.

In addition, HTI draws attention to another area of privacy reform that needs to be urgently addressed: the creation of specific laws relating to facial recognition and other biometric technologies. The development and use of facial recognition technology in Australia is largely unregulated. Current law does not adequately address the risks of harm associated with facial recognition technology. We call on the Government to implement the recommendations from HTI’s 2022 report, *Facial recognition technology: Towards a model law*.⁷ This should be implemented alongside broader Privacy Act reforms.

⁷ N Davis, L Perry and E Santow, *Facial Recognition Technology: Toward a Model Law* (2022) Human Technology Institute, UTS.