



Serious Invasions of Privacy in the Digital Era: Submission to the Australian Law Reform Commission

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Introduction 2

- The Public Interest Advocacy Centre2
- PIAC’s work on privacy2
- Principles guiding reform4
- Response to Question 14

A statutory cause of action for serious invasion of privacy 5

- The impact of a statutory cause of action5
- Response to Question 2 5
- Invasion of privacy8
- Response to Question 48
- Privacy and the threshold of seriousness 9
- Response to Question 69
- Privacy and public interest10
- Response to Question 7 10
- Response to Question 8 11
- Fault 12
- Response to Question 9 12
- Damage 13
- Response to Question 10 13
- Defences and exemptions 14
- Response to Question 12 14
- Response to Questions 13 and 14 15
- Response to Question 15 16
- Monetary remedies 17
- Response to Question 16 17
- Injunctions 18
- Response to Question 17 18
- Other remedies 18
- Response to Question 18 18
- Who may bring a cause of action 20
- Response to Question 19 20
- Response to Question 20 21
- Location and forum 22
- Response to Question 22 22
- Response to Question 23 22
- Response to Question 24 23

Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights; and
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from Trade and Investment, Regional Infrastructure and Services NSW for its work on energy and water, and from Allens for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

PIAC's work on privacy

PIAC has a long history as a strong advocate for the protection of privacy rights of Australians. PIAC has provided legal advice, assistance and representation to clients in a number of matters involving alleged breaches of the *Privacy and Personal Information Protection Act 1998* (NSW) (PPIP Act) and the *Privacy Act 1988* (Cth) (Privacy Act).

Based on PIAC's experience as both a community legal centre and a consumer advocacy organisation, PIAC believes that Australia's current legal framework does not adequately protect Australians' privacy rights. PIAC supports the introduction of a statutory cause of action for serious invasions of privacy. The existing legal framework is inadequate especially in comparison with the regimes for the protection of privacy in overseas jurisdictions.

PIAC has contributed submissions to the Department of Prime Minister and Cabinet (DPM&C) about a Commonwealth statutory cause of action for serious invasion of privacy¹ and the Unified

¹ Elizabeth Simpson, *It's time: Submission in response to the Department of Prime Minister and Cabinet's Issue Paper – A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy* (17 November 2011) Public Interest Advocacy Centre <<http://www.piac.asn.au/publication/2011/11/its-time-submission>>.

Privacy Principles,² the Australian Law Reform Commission (ALRC) in response to its Discussion paper 72,³ and the NSW Law Reform Commission (NSWLRC) in response to Consultation Paper 3⁴ and Consultation Paper 1.⁵

PIAC notes that the ALRC's current inquiry focuses on serious invasions of privacy in the digital era. The Hon Michael Kirby AC CMG has noted 'the extraordinary capacity of technology today to offer fresh ways of invading privacy'.⁶ There can be no doubt that the advent of technological developments, such as the internet and digital technologies, have made individual privacy increasingly vulnerable to attack. For example, technology now exists that makes it possible for security agencies to track people via their mobile phones and to obtain information about their internet use effectively in real-time.⁷ There is also an increased incidence of surveillance in all areas of public life, frequently justified as a counterterrorism measure.

Most Australians regard privacy as important and expect a high level of privacy protection. A 2013 survey commissioned by the Office of the Australian Information Commissioner found that technological developments have increased Australians' privacy concerns. In particular, Australians believe the biggest privacy risks facing people are online services, including social media sites. A quarter of those surveyed felt that the identity fraud and theft was the biggest risk, and 30% of respondents claimed that they provide false information as a way of protecting their privacy.⁸

This submission draws on PIAC's earlier submissions to the DPM&C, the ALRC and the NSWLRC. PIAC has chosen to comment only on specific questions related to areas where it has expertise and experience working with the community.

² Robin Banks, *Unified Privacy Principles – the right way ahead: comments to the Federal Department of Prime Minister and Cabinet on the draft UPPs* (2 February 2009) Public Interest Advocacy Centre <<http://www.piac.asn.au/publication/2009/02/090202-piac-upp-sub>>.

³ Anne Mainsbridge and Robin Banks, *Resurrecting the Right to Privacy: Response to the Australian Law Reform Commission Discussion Paper 72: Review of Australian Privacy Law* (21 December 2007) Public Interest Advocacy Centre <http://www.piac.asn.au/sites/default/files/publications/extras/07.12.21-PIAC_Sub_to_DP72.pdf>.

⁴ Public Interest Advocacy Centre, *Improving clarity and enhancing protection of privacy rights: response to the NSW Law Reform Commission's Consultation Paper 3: Privacy Legislation in NSW* (24 December 2008) Public Interest Advocacy Centre <<http://www.piac.asn.au/publication/2009/01/081224-piac-nswprivacy>>.

⁵ Anne Mainsbridge, *Matching Rights with remedies: a statutory cause of action for invasion of privacy; Submission to the NSW Law Reform Commission Consultation Paper 1 – Invasion of Privacy* (3 October 2007) Public Interest Advocacy Centre <<http://www.piac.asn.au/publication/2007/10/071003-nswlrcprivacy-submission>>.

⁶ The Hon Justice Michael Kirby, 'Privacy – In the Courts' (2001) 24(1) *University of NSW Law Journal* 247.

⁷ Tom Allard, 'Spy Laws Track Mobile Phones', *Sydney Morning Herald* (Sydney) 17 September 2007, 1.

⁸ Office of the Australian Information Commissioner, *Community Attitudes to Privacy survey, Research Report 2013*.

Principles guiding reform

Response to Question 1

What guiding principles would best inform the ALRC's approach to the Inquiry and, in particular, the design of a statutory cause of action for serious invasion of privacy? What values and interests should be balanced with the protection of privacy?

PIAC supports all of the guiding principles outlined in the Issues Paper to inform the development of proposals for reform: privacy as a value, privacy as a matter of public interest, the balancing of privacy with other values and interests, international standards in privacy law, flexibility and adaptability, coherence and consistency, and access to justice.

However, not all of these principles are equal; there is a necessary hierarchy. As privacy is a human right, recognised as such in international law, this must take precedence over other competing principles or interests.

It is pleasing that the Issues Paper specifies that the protection of privacy in Australia should be consistent with Australia's international obligations; for example, under the International Covenant on Civil and Political Rights (ICCPR). In addition, PIAC suggests including 'privacy as a human right' as a separate additional principle guiding reform.

Privacy has been described as 'one of the most important human rights issues of the modern age.'⁹ The right to privacy is recognised as a fundamental human right in the Universal Declaration of Human Rights (UDHR), the ICCPR and numerous other international instruments and treaties.¹⁰ Australia was, of course, a strong advocate of the UDHR and has ratified relevant conventions requiring States Parties to protect the right to privacy.

Article 17 of ICCPR provides:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.¹¹

In recent years, the right to privacy has been specifically enshrined in the human rights legislation of the Australian Capital Territory and Victoria. Section 13 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and s 12 of the *Human Rights Act 2004* (ACT) provide that a person has the right not to have his or her privacy, family, home or correspondence unlawfully interfered with, and not to have his or her reputation unlawfully attacked.

In the absence of a comparable federal statutory or constitutional human rights charter, federal law does not prescribe how privacy should apply in its inevitable interaction and friction with other

⁹ D Banisar (Electronic Privacy Information Centre) and Privacy International, *Privacy and Human Rights 2000: An International Survey of Privacy Laws and Developments*, 1, <<http://www.privacyinternational.org/survey/phr2000/overview.html>>.

¹⁰ See for example United Nations *Convention on the Protection of the Rights of all Migrant Workers and Members of their Families* A/RES/45/158 (25 February 1991), Article 14; United Nations *Convention on the Rights of the Child* UNGA Doc A/RES/44/25 (12 December 1989) with Annex, Article 16.

¹¹ *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23 (entered into force generally on 23 March 1976).

rights and interests. The current ALRC inquiry does not present the appropriate forum to explore the relative merits of enacting a federal human rights charter. For present purposes, it suffices to say that the absence of such legislation makes it more difficult for individuals, and ultimately the courts, to articulate the appropriate limits or scope of privacy as an enforceable right.

Privacy is not an absolute right. Under international human rights law, privacy must accommodate certain other human rights and interests, especially freedom of expression. Similarly, under international and domestic Australian law, freedom of expression is itself not absolute.

The starting point in determining how privacy and freedom of expression should accommodate each other is provided by international law itself. As a derogable (ie, non-absolute) right, privacy can be limited when such limitations are 'prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others'.¹² A human rights analysis assists in the balancing of privacy and other values and interests, but the values and interests must be clearly defined, in order to avoid an overly wide interpretation. For example, it would be inappropriate for privacy, as a fundamental human right, to be traded off against business interests or an interest in the dissemination of gossip.

In addition, the common law has long recognised that the public interest requires the maintenance of freedom of expression. This relates to the free flow of information, the freedom to hold and impart ideas and the right of the public to be informed on matters of public interest. PIAC notes that some jurisdictions take into account the 'newsworthiness' of information when considering whether or not the right to freedom of expression should qualify the right to privacy.¹³ PIAC considers that this test is too broad, and risks privileging freedom of expression over privacy to the extent that a statutory cause of action for the protection of privacy could be rendered meaningless. This is discussed further in response to Question 8 below.

A statutory cause of action for serious invasion of privacy

The impact of a statutory cause of action

Response to Question 2

What specific types of activities should a statutory cause of action for serious invasion of privacy prevent or redress? The ALRC is particularly interested in examples of activities that the law may not already adequately prevent or redress.

The current regulatory regime does not adequately protect the privacy of Australians. The Privacy Act, like the privacy legislation in the Australian states and territories, focuses on information privacy or data protection. It does not protect against invasions of privacy that involve interference with one's person or territory.

¹² Ibid., art 18(3).

¹³ The general approach in the United States, driven by the First Amendment, permits the publication of 'newsworthy information'. The *Privacy Act* RSS 1978 cP-24 (Saskatchewan) s 4(1)(e) contains a defence that the violation was necessary and incidental to newsgathering and reasonable in the circumstances.

Additionally, the Privacy Act contains a myriad of exemptions, which are overly broad in their scope and serve to undermine the effectiveness of the Act. Some of these include:

- The exemption for 'employee records'.¹⁴
- The exemption for small businesses.¹⁵
- The exemption for 'media organisations'.¹⁶

It has been PIAC's experience in privacy litigation that respondents tend to push exemptions to the limit, rather than agreeing that they ought properly be construed narrowly given the beneficial nature of the legislation. In one case, PIAC acted for a client whose medical records had been exposed inadvertently on the internet by an employee of the hospital that the client had attended for medical treatment. The respondent hospital argued strenuously that it was not a 'public sector agency' under the PPIP Act and the client, despite having been subjected to a serious breach of her privacy, elected to settle the matter rather than to proceed to a hearing because of the uncertainty surrounding jurisdictional issues.

In some instances, there has been a failure to enforce criminal laws that are intended to protect privacy. For example, s 11 of the *Children (Criminal Proceedings) Act 1987* (NSW) makes it a criminal offence to publish or broadcast the name, or any identifying information, of a young person who is involved in criminal proceedings at any time before, during or after the proceedings. Despite this, the media occasionally identify children and young people involved in criminal proceedings in NSW.¹⁷

In PIAC's experience, criminal proceedings are rarely initiated where an offence pursuant to s 11 of the *Children (Criminal Proceedings) Act 1987* (NSW) has been committed. As this offence provision is rarely enforced, children and their families often endure negative consequences beyond the punishment meted out by the criminal justice system. For example, PIAC is aware of children who have experienced significant difficulties securing placements in schools and other educational and vocational institutions as a result of public disclosure of their involvement in the criminal justice system. A general right to take legal action for invasion of privacy would help to address the mischief that the NSW legislation was intended to address.

Another limitation in existing privacy law was highlighted by PIAC's experience representing a woman who was detained at an immigration detention centre following a raid by the Department of Immigration and Citizenship on a massage parlour. A journalist and photographer from the *Daily Telegraph* accompanied the Department on the raid and a few days later an article about

¹⁴ *Privacy Act 1988* (Cth) s 7B(3).

¹⁵ *Privacy Act 1988* (Cth) s 6C(1). The effect of this provision, when read in conjunction with the definitions of 'small business' and 'small business operator' in section 6D is that businesses with an annual turnover of \$3 million or less have been exempt from the *Privacy Act 1988* (Cth). This exemption has been heavily criticised, as an estimated 94 percent of businesses fall below the limit. In 2007 the ALRC recommended the removal of the small business exemption: see Rec 39-1 in Australian Law Reform Commission, *Report 108 - For Your Information: Australian Privacy Law and Practice* (2008), <http://www.alrc.gov.au/publications/report-108>.

¹⁶ *Privacy Act 1988* (Cth) s 7B(4).

¹⁷ For example, Channel 7's Today Tonight program broadcast a story on 1 March 2005 that directly identified 'DR', one of two young persons killed as a result of a motor vehicle collision following a police pursuit in Macquarie Fields. The story also made false claims about DR's criminal history. In 2008, Ten News, Nine, Seven, Fairfax and News Ltd reported on a NSW man who allegedly murdered his wife and step-daughter and threw their bodies off a cliff in the Blue Mountains, identifying both victims and the girls' step-father. Interestingly, ABC did not name the victims or alleged perpetrator as they thought it would be in breach of s 11.

the raid was published in that newspaper. The article did not disclose our client's name, but identified her nationality and the fact that she had been detained at an immigration detention centre, naming the centre. At the time, she was the only woman of that nationality at the detention centre and so was identified by members of her community and fellow detainees.

She subsequently suffered harassment and was ostracised by her family and community.

In 2005, PIAC wrote to the Office of the Privacy Commissioner (OPC) alleging that the Department had interfered with her privacy under the Privacy Act. The OPC then asked the parties to engage in conciliation, which continued for almost four years. When conciliation reached an impasse, the OPC indicated that it was minded to terminate the complaint under s 41(2)(a) of the Privacy Act, which would have left our client with no opportunity to appeal against the decision. As a result, our client felt that she had little choice but to accept the Department's offer of \$10 000 compensation for the psychiatric injury she had suffered as a result of the publication of the article.

PIAC's client was extremely unhappy with the outcome of the complaint and felt that there was no justice in her case. While our client had been able to make a complaint under the Privacy Act, because the OPC had the power to terminate the complaint, without providing any avenue of appeal from this decision, this remedy was effectively illusory. Our client had also initially considered bringing a common law claim but abandoned this aspect of her complaint because of the uncertain state of the common law regarding a tort of privacy.

The deficiencies in the current legal system mean that a person may have no legal recourse and/or remedies in the following circumstances:

- A man with an intellectual disability is filmed without his knowledge or consent while he is defecating in a public place. The film is subsequently shown on the internet.¹⁸
- Personal information about a convicted inmate is disclosed to the media by the Department of Corrective Services. The inmate's spouse and children suffer hurt, humiliation and distress as a result. Although they can bring a complaint before the relevant public authority, they are not entitled to any monetary compensation if the complaint is upheld.¹⁹
- A NSW Police officer releases the name of a person suspected of a crime to the media, and asserts that the information related to 'core policing functions'.²⁰
- A teenage girl suffers humiliation and distress upon finding out that she was secretly filmed while getting changed at a swimming pool. The girl has no means of seeking compensation.²¹

¹⁸ This is based on a real situation.

¹⁹ This is a hypothetical example based upon the operation of the *Privacy and Personal Information Protection Act 1998* (NSW) ss 53(7A) and 55(4A).

²⁰ Section 27 of the *Privacy and Personal Information Protection Act 1998* (NSW) gives the NSW Police an exemption from the Information Protection Principles other than in relation to their administrative and educative functions. See *HW v Commissioner of Police, New South Wales Police Service and Anor* [2003] NSWADT 214 and *GA v Police* [2005] NSWADT 121.

²¹ This is based on a real situation. See Linda McKee, 'Secretly filmed teen girl has two weeks to appeal verdict' (12 October 2007) *Belfast Telegraph*, <<http://www.belfasttelegraph.co.uk/news/local-national/secretly-filmed-teengirl-has-two-weeks-to-appeal-verdict-13482843.html>>.

- A man left a copy of a video tape of him having sex with an ex-girlfriend with her father, showed the tape to another person and threatened to show it to her employee. The court concluded that there was no legal redress.²²

A general cause of action for the protection of privacy would provide legal recourse and potential remedies in these situations and would also bring Australia into step with other common law jurisdictions such as the United Kingdom and New Zealand, as well as with most European nations. It would also give effect to Australia's international obligations under Article 17 of the ICCPR.

Invasion of privacy

Response to Question 4

Should an Act that provides for a cause of action for serious invasion of privacy (the Act) include a list of examples of invasions of privacy that may fall within the cause of action? If so, what should the list include?

PIAC believes it would be helpful for the Act to include a non-exhaustive list of examples of invasions of privacy that may fall within the cause of action. This would provide courts (and the parties) with some guidance, and provide certainty and clarity by giving context to the cause of action and the circumstances in which it might arise. As PIAC submitted to the DPM&C in 2011, the model also has the following advantages:

- it avoids the almost impossible task of providing a conclusive definition of the term 'privacy' (a step that could potentially limit 'privacy', and one that was avoided, rightly in PIAC's view, by the ALRC in its previous inquiry);²³
- it is open-ended and inclusive, which would build sufficient flexibility into the proposed cause of action for it to be appropriately adapted to changing social and technological circumstances;
- it strikes an appropriate balance between being a general, but structured cause of action; and,
- it allows for appropriate development of the law to meet changing social and technological circumstances.

As the Issues Paper acknowledged, the ALRC has previously considered that a serious invasion of privacy may occur where:

- a) there has been an interference with an individual's home or family life;
- b) an individual has been subjected to unauthorised surveillance;
- c) an individual's correspondence or private, written, oral or electronic communication has been interfered with, misused or disclosed, or
- d) sensitive facts relating to an individual's private life have been disclosed.²⁴

²² *Giller v Procopets* [2004] VSC 113.

²³ Australian Law Reform Commission, *Report 108 - For Your Information: Australian Privacy Law and Practice* (2008), <http://www.alrc.gov.au/publications/report-108> [1.31]-[1.68].

²⁴ *Ibid.*

As it has previously stated, PIAC is concerned that the wording of (a) may be too narrow. Sometimes conduct that is invasive of privacy takes place outside the realm of a person's home or family life. For example, the defendant in *Grosse v Purvis*²⁵ persistently loitered at or near the plaintiff's places of work and recreation, as well as near her place of residence. He also made repeated offensive phone calls to her while she was at work. In PIAC's view, any act that intrudes upon the privacy or seclusion of the plaintiff should come within the cause of action, regardless of where it takes place and whether or not it involves family in some way.

PIAC takes the view that (b) should be extended to make it clear that there is an invasion of privacy if a person discloses information, documentation or material obtained by unauthorised surveillance. In many cases, it is not just the act of surveillance itself that leads to an invasion of privacy, but also the subsequent use that is made of material gained during surveillance (for example, publication of the material by the media). It is also very straightforward to publish material on the internet, often with devastating effects.

Finally, PIAC submits that (d) should be broadened to take account of physical privacy intrusions such as unreasonable search and seizure, or media harassment. These intrusions may not necessarily result in disclosure of sensitive facts relating to an individual's private life, but they may nonetheless amount to arbitrary or unlawful interference with privacy.²⁶

Recommendation

The Act should include a non-exhaustive list of examples of invasions of privacy that may fall within the cause of action.

Privacy and the threshold of seriousness

Response to Question 6

What should be the test for actionability of a serious invasion of privacy? For example, should an invasion be actionable only where there exists a 'reasonable expectation of privacy'? What, if any, additional test should there be to establish a serious invasion of privacy?

PIAC supports the recommendation of the ALRC, NSWLRC and VLRC that the key criterion to determine whether a matter is private is the existence of a 'reasonable expectation of privacy' in the circumstances.²⁷ PIAC considers that the 'reasonable expectation' test is fluid enough to take account of factors such as the nature and incidence of the act, conduct or publication, the age and circumstances of the plaintiff, the relationship between the parties, and the place where the alleged invasion of privacy took place.

In our earlier submissions to the ALRC, NSWLRC and DPM&C, PIAC argued that an appropriate test of seriousness may be where the act complained of would be regarded as offensive 'to a

²⁵ [2003] QDC 151.

²⁶ Mainsbridge, above n 3, 23-24.

²⁷ Australian Law Reform Commission (ALRC), *For Your Information: Australian Privacy Law and Practice*, Report No 108 (2008) Rec 74-2; Victorian Law Reform Commission (VLRC), *Surveillance in Public Places*, Report No 18 (2010) Recs 25, 26; NSW Law Reform Commission (NSWLRC), *Invasion of Privacy*, Report No 120 (2009) 24.

reasonable person of ordinary sensibilities'. PIAC took the view that the 'highly offensive' test was too high and uncertain. In making this argument, PIAC referred to the comments of Nicholls LJ in *Campbell v MGN Ltd*:

[The] highly offensive formulation can all too easily bring into account, when deciding whether the disclosed information was private, considerations which go more properly to issues of proportionality; for instance, the degree of intrusion into private life, and the extent to which the publication was a matter of proper public concern. This could be a recipe for confusion.²⁸

PIAC continues to hold this view. It is neither necessary nor appropriate to restrict the proposed cause of action to 'highly offensive' invasions of privacy. PIAC also supports the approach taken by the NSWLRC, which concluded that the question whether the conduct is 'highly offensive' may be a relevant consideration as part of the 'nature of conduct' but it should not form a separate limb of the threshold test.²⁹

Recommendation

The test for actionability of a serious invasion of privacy should be whether there exists a 'reasonable expectation of privacy' in the circumstances. It is neither necessary nor appropriate to restrict the proposed cause of action to 'highly offensive' invasions of privacy.

Privacy and public interest

Response to Question 7

How should competing public interests be taken into account in a statutory cause of action? For example, should the Act provide that:

- **competing public interests must be considered when determining whether there has been a serious invasion of privacy; or**
- **public interest is a defence to the statutory cause of action?**

As outlined earlier, PIAC agrees that the right to privacy is not an absolute right and that it should, in some circumstances, give way to certain countervailing rights and interests such as the right to freedom of expression and national security.

However, this should not detract from the significant 'public interest' in maintaining privacy and upholding confidences.³⁰ If people do not feel their privacy is going to be protected, they will be less inclined to be forthcoming with information, and may provide misleading information.

As PIAC said previously to the DPM&C, PIAC disagrees with the ALRC and NSWLRC's view that the different public interests should be incorporated into the cause of action itself. Instead, PIAC prefers the VLRC's approach to this issue – namely, that it is more appropriate for competing public interests to be one of a number of defences to the proposed cause of action. PIAC agrees with the VLRC's recommendation that the public interest defence should specify that 'public

²⁸ *Campbell v MGN Ltd* [2004] 2 AC 457 at [22].

²⁹ NSWLRC, above n 27, [5.9], [5.11].

³⁰ *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, per Lord Keith of Kinkell at 2.

interest is a limited concept and not any matter the public may be interested in'.³¹ This is discussed further in response to Question 8 below.

PIAC contends that there are two problems with the alternative approach of incorporating a balancing test into the cause of action itself. First, it places an unreasonably onerous evidentiary burden on plaintiffs and is likely to discourage the bringing of claims under the statute. Further, the question of balancing countervailing public interests really only arises where the respondent seeks to rely on a public interest defence.

As PIAC proposes public interest should be a defence to the statutory cause of action, the onus of proof should necessarily lie with the defendant.

Recommendation

A cause of action for the invasion of privacy should recognise the right to privacy as a public interest in itself that has to be balanced against competing public interests such as freedom of communication. The appropriate time for this balancing process to take place is when considering whether or not there is a successful defence to an action for invasion of privacy.

Response to Question 8

What guidance, if any, should the Act provide on the meaning of 'public interest'?

Like the term 'privacy', the term 'public interest' is not easy to define. It has been characterised by Lord Denning MR as 'a matter that is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on, or what may happen to them or others'.³²

It is important to distinguish between whether it is in the public interest to make something known, or whether it is simply 'interesting' to the public to make something known. PIAC favours a 'legitimate public concern' test as was applied in the New Zealand case of *Hosking v Runting*.³³ This test considers whether there is legitimate public concern in the information or material to justify publication and whether in the circumstances those to whom publication is made can reasonably be said to have a right to be informed of it.³⁴

The most obvious public interest factor that should qualify an otherwise actionable invasion of privacy is the right to freedom of expression.

The common law has long recognised that the public interest requires the maintenance of freedom of expression. This relates to the free flow of information, the freedom to hold and impart ideas and the right of the public to be informed on matters of public interest.

As mentioned earlier in response to Question 1, PIAC notes that some jurisdictions take into account the 'newsworthiness' of information when considering whether or not the right to freedom

³¹ VLRC, above n 27, 7.187.

³² *London Artists Ltd v Little* [1969] 2 QB 375 at 391.

³³ [2005] 1 NZLR 1.

³⁴ *Hosking v Runting* [2005] 1 NZLR 1 [133]-[134].

of expression should qualify the right to privacy.³⁵ PIAC considers that this test is too broad, and may privilege freedom of expression over privacy to the extent that a statutory cause of action for the protection of privacy could be rendered meaningless.

In addition, any legislated right to privacy must not impinge disproportionately on the freedom of political communication implied in the Australian Constitution.³⁶ This constitutional protection prevents the Commonwealth, States and Territories from introducing laws that restrict communication on political and governmental matters in a manner that is inconsistent with Australia's system of representative government.

The public interest may sometimes also require disclosure of matters relating to national security, the commission of criminal offences or threats to public health or safety. This is a non-exhaustive list of public interest factors and it is acknowledged that there may occasionally be other public interest factors.

All of these interests are not equal, and this needs to be acknowledged in the guidance the Act provides on the meaning of 'public interest'.

Recommendation

The Act should provide guidance on the term 'public interest' by setting out a non-exhaustive list of public interest factors, including freedom of expression, freedom of political communication, threats to national security, potential criminal conduct and threats to public health or safety.

Fault

Response to Question 9

Should the cause of action be confined to intentional or reckless invasions of privacy, or should it also be available for negligent invasions of privacy?

PIAC reiterates the comments it made in its earlier submissions to the ALRC and DPM&C about this issue.³⁷

PIAC agrees that a person or entity should be liable for acts that deliberately or wilfully invade a plaintiff's privacy. PIAC also agrees that liability should extend to reckless acts, where, for example, the defendant deliberately ignored a risk of harmful consequences arising from an action, or failed to give any thought as to whether there was any such risk.

In PIAC's view, the action should also extend to negligent acts on the part of the defendant. In some cases, negligent acts can lead to extremely serious breaches of privacy, where the impact can be just as serious for the plaintiff as that of a deliberate or reckless breach.

³⁵ The general approach in the United States, driven by the First Amendment, permits the publication of 'newsworthy information'. The Privacy Act RSS 1978 cP-24 (Saskatchewan) s 4(1)(e) contains a defence that the violation was necessary and incidental to newsgathering and reasonable in the circumstances.

³⁶ See, eg, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

³⁷ Mainsbridge, above n 5, 24-26 and Simpson, above n 1.

For example, in one matter, PIAC acted for a client whose medical records were exposed on the internet by an employee of the hospital that she had been attending for treatment. Although the employee's act was negligent, rather than deliberate or reckless, the impact on the client was catastrophic because of her vulnerability and the sensitivity of the information disclosed, which included information about treatment for a psychiatric illness.

Many systemic breaches of privacy may be due to negligence, rather than to reckless or intentional acts. For example, an organisation with inadequate security procedures might unwittingly release personal information about a number of its clients. It is undesirable that victims of these breaches of privacy should have no legal recourse.

Restricting liability to reckless or intentional acts may also discourage organisations from taking steps to ensure that their privacy management systems are adequate, and may encourage indifference to privacy protection.

As with other laws that protect against breaches of fundamental human rights, such as antidiscrimination laws, it is important that laws protecting the right of privacy do not require the plaintiff to establish intention. To do so would be to set the bar too high, and fail to encourage compliance promotion activities.

Finally, PIAC notes that the VLRC agreed that there may be some cases where the invasion of privacy was caused by a negligent act but it is still sufficiently serious that it should be protected under the proposed cause of action.³⁸

Recommendation

The proposed cause of action should not be confined to intentional or reckless invasions of privacy; it should also be available for negligent invasions of privacy.

Damage

Response to Question 10

Should a statutory cause of action for serious invasion of privacy require proof of damage or be actionable *per se*?

As PIAC submitted to the DPM&C, an invasion of privacy should be actionable *per se*. PIAC considers that it would be inappropriate and potentially very restrictive to require a plaintiff to prove that any actual loss or damage arose from the alleged invasion of privacy. In many cases, there will be a lack of clear, provable damage arising from a breach of privacy. This is unsurprising: privacy is a human right. As such, it is designed to protect a facet of one's individual dignity. One's dignity is vitally important but its intrinsic nature makes it difficult to quantify in monetary terms the impact of any damage to it.

The majority of the clients for whom PIAC has acted in breach of privacy matters have suffered distress, humiliation and insult as a result of invasions of their privacy, rather than any provable psychiatric or economic damage. In some cases, the effect of a breach of privacy may simply be

³⁸ VLRC, above n 27 [7.143].

to stop someone doing something that they would normally do. For example, if they have been subjected to unauthorised surveillance, they may feel reluctant to leave their home. In this type of situation, it is difficult to point to any provable damage in a legal sense.

PIAC notes that the privacy statutes of British Columbia, Saskatchewan, Manitoba, Newfoundland and Labrador all provide that the tort of violation of privacy is actionable per se.³⁹

This was also the approach recommended by the ALRC, NSWLRC and VLRC. PIAC supports this approach. Privacy is a fundamental human right; it should not be necessary to prove damage arising from its breach.

Recommendation:

The legislation should provide that the proposed cause of action is actionable without proof of damage.

Defences and exemptions

Response to Question 12

In any defence to a statutory cause of action that the conduct was authorised or required by law or incidental to the exercise of a lawful right of defence of persons or property, should there be a requirement that the act or conduct was proportionate, or necessary and reasonable?

PIAC supports a defence to the statutory cause of action that the act or conduct was required or authorised by or under law.

In this defence, PIAC supports including a requirement in the statutory cause of action that the act or conduct was proportionate. This is consistent with privacy's status as a human right, recognised at international law. Derogable human rights can be limited if the limitation is proportionate and necessary to achieve its purpose. The UN Human Rights Committee has stated that proportionality is a fundamental test that must be met for any form of restriction on human rights under the ICCPR.⁴⁰

Factors to consider when assessing whether an action is proportionate are:

- Why is the action necessary?
- To what extent does the action impair the right?
- Could the purpose of the action be achieved through less restrictive measures?
- Do legal safeguards against abuse exist?

In relation to the issue of consent mentioned in paragraph 64 of the Issues Paper, PIAC suggests that this issue should form part of the cause of action rather than a defence. This was the approach adopted by both the ALRC⁴¹ and the NSWLRC.⁴² However, as PIAC noted in its earlier

³⁹ *Privacy Act* RSBC 1996 (British Columbia), c373, s 1(1); *Privacy Act* RSS 1978, cP-24 (Saskatchewan) s 2; *Privacy Act* CCSM cP125 (Manitoba) s 2(1); *Privacy Act* RSNL 1990 cP-22 (Newfoundland and Labrador) s 3(1).

⁴⁰ UN Human Rights Committee, General Comment No. 29 - States of Emergency (Article 4), [4].

⁴¹ ALRC, above n 27, 74.159.

submission to the NSWLRC, the issue of consent is complex. It is important to recognise that some people may have limited or no capacity to give or refuse consent (in a meaningful sense) to an invasion of privacy. For example, minors, people in detention, people with intellectual disability and people with mental illness may face barriers in exercising their privacy rights, including consent. Similarly, where (as is often the case) consent is sought through the fine print of a contract that is unlikely to be considered with care by a consumer, consent becomes illusory.

The statutory cause of action should be framed so that it takes account of whether consent is given genuinely and freely, is not obtained by fraud or duress, and demonstrates actual agreement between the parties.

PIAC notes that in some circumstances, it may actually be impossible to refuse consent to what is potentially a breach of privacy. For example, one cannot meaningfully consent, or refuse, to being subjected to video surveillance when standing in a lift or using an automatic teller machine. In most, if not all, such circumstances, there is no alternative to using the particular facility to access services. Consideration needs to be given to whether there should also be legislated obligations to disclose the use of video or other surveillance wherever it is used. Arguably, without such obligations, any consent is illusory.

Recommendation

The proposed statutory cause of action should include a defence that the act or conduct was required or authorised by or under law. The defence should provide that any impingement on privacy was proportionate.

The statutory cause of action should be framed in such a way that it takes into account whether consent is informed, genuine and given freely in the circumstances.

Response to Questions 13 and 14

What, if any, defences similar to those to defamation should be available for a statutory cause of action for serious invasion of privacy?

What, if any, other defences should there be to a statutory cause of action for serious invasion of privacy?

PIAC does not believe that it is necessary for any other defences to be available for a statutory cause of action for serious invasion of privacy. PIAC has said previously that the legislation should provide that all of the following should be defences to a prima facie invasion of a person's privacy:

- The alleged wrong-doer's conduct was incidental to the lawful right of defence of person or property, and was a reasonable and proportionate response to the threatened harm;
- The alleged wrong-doer's conduct was authorised or required by law;
- The alleged wrong-doer is a police or public officer who was engaged in his/her duty and his/her conduct was neither disproportionate to the matter being investigated nor committed in the course of a trespass;
- The alleged wrong-doer's conduct was in the public interest, where public interest is a limited concept and not any matter that the public may be interested in.

⁴² NSWLRC, above n 27, 46.

The legislation should provide that there will not be an invasion of privacy if the individual has provided full and informed consent to the purported invasion of privacy.

PIAC does not believe that the fact that the information was already in the public domain should be a defence. As PIAC said to the NSWLRC, the collection, use and disclosure of information about a person from publicly available sources can still have considerable privacy impacts.⁴³ For example, information in the public domain would arguably include press clippings, which might contain inaccurate information, or accurate information that is open to misinterpretation.

Information may still be private and personal to the plaintiff, despite the fact that it has been published, or is contained in a public record (for example, a person's criminal record, their HIV status, or the fact that they are a rape victim). Although, technically, the public can access many records, access to them may be constrained in reality by practical and logistical constraints, such as the need to pay a fee.⁴⁴

In some cases information could be in the 'public domain' erroneously or unlawfully. For example, a copy of a letter from the manager of an organisation to an employee reprimanding the employee for unprofessional conduct might be leaked to persons outside the organisation, including the media.⁴⁵ In cases such as this, the plaintiff should not be denied a remedy.

Response to Question 15

What, if any, activities or types of activities should be exempt from a statutory cause of action for serious invasion of privacy?

As PIAC submitted to the DPM&C, PIAC disagrees with the suggestion that particular activities, organisations or types of activities or organisations should be automatically exempt from the operation of the proposed cause of action. There seems no principled justification for such a general 'carve out'. If the cause of action is framed appropriately, there is no need for general exemptions. Furthermore, PIAC notes that none of the ALRC, NSWLRC or the VLRC supported this proposal.

If other submissions advocate for certain activities to be exempt from a statutory cause of action, or the ALRC believes there is a need for some activities to initially be exempt from a statutory cause of action, the case for those exemptions should be made publicly and interested stakeholders should be given a chance to comment. If any exemptions are included, they should be subject to a comprehensive regular reassessment, and the exemptions should be limited to the greatest extent possible.

⁴³ NSWLRC, above n 27, 19-20.

⁴⁴ Hong Kong Law Reform Commission, *Civil Liability for Invasion of Privacy* (2004) [7.109].

⁴⁵ *Reuber v Food Chemical News Inc* 925 F2d 703 (United States Court of Appeal, 4th Circuit, 1990).

Monetary remedies

Response to Question 16

Should the Act provide for any or all of the following for a serious invasion of privacy:

- a maximum award of damages;
- a maximum award of damages for non-economic loss;
- exemplary damages;
- assessment of damages based on a calculation of a notional licence fee;
- an account of profits?

PIAC supports the Act providing for all five of these monetary remedies for a serious invasion of privacy.

In relation to the amount of damages for non-economic loss that can be awarded for serious invasions of privacy, PIAC does not support the specification of a maximum award or the imposition of a 'cap'. PIAC recommends that damages should be unlimited because if the ceiling is set too low, it will be inadequate to redress unlawful conduct, and will fail to deter recidivist respondents.

PIAC notes that the *Anti-Discrimination Act 1977* (NSW) (ADA) has a \$40,000 cap on damages,⁴⁶ and that this statutory cap has been the subject of some compelling criticism.⁴⁷ A further problem is that any increase to the ceiling requires statutory amendment, which can be a time-consuming and politically fraught process.

If, however, damages are to be limited, they should be set at the current limit for the District Court, or alternatively set in accordance with defamation legislation, given that this protects an analogous right. For example, the *Defamation Act 2005* (NSW) provides that the maximum amount of damages for non-economic loss that may be awarded is \$250,000.⁴⁸

In relation to exemplary damages, there may be circumstances where an invasion of privacy may be of such a malicious or high-handed manner that it warrants an award of exemplary damages. The threat of exemplary damages may also serve as a deterrent, thereby giving some 'teeth' to the legislation.

As previously submitted to the NSWLRC,⁴⁹ PIAC supports the use of orders for account of profits in response to invasions of privacy as an alternative to compensatory damages. Orders of this nature will prevent unjust enrichment of respondents and will also act as a deterrent in the case of 'serial respondents', or respondents who are unlikely to be particularly adversely affected by being ordered to pay compensatory damages. An example of such a respondent would be a publisher who undertakes a risk benefit analysis to deliberately calculate whether or the profits

⁴⁶ *Anti-Discrimination Act 1977* (NSW) s 108(2)(a).

⁴⁷ See, for example, Review of the *Administrative Decisions Tribunal Act 1997* (NSW), Submission of the NSW Anti-Discrimination Board, March 2003, 8; *Peck v Commissioner of Corrective Services* [2002] NSWADT 122, in which the ADT implied that it would have awarded the complainant in excess of \$40,000 had it not been for the limit imposed by the *Anti-Discrimination Act 1977* (NSW) on the quantum of damages that the Tribunal could award.

⁴⁸ *Defamation Act 2005* (NSW), s 35(1).

⁴⁹ Mainsbridge, above n 5, 29-30.

likely to be made from the sale of their publication, would outweigh any damages that they may have to pay to a plaintiff for breaching their privacy.

Recommendation:

The legislation should provide that the court (or tribunal) is empowered to choose the remedy, which can include one or more of the following remedies:

- *damages;*
- *damages for non-economic loss;*
- *exemplary damages;*
- *assessment of damages based on a calculation of a notional licence fee;*
- *an account of profits.*

Injunctions

Response to Question 17

What, if any, specific provisions should the Act include as to matters a court must consider when determining whether to grant an injunction to protect an individual from a serious invasion of privacy? For example, should there be a provision requiring particular regard to be given to freedom of expression, as in s 12 of the *Human Rights Act 1998* (UK)?

PIAC suggests that the ordinary principles for determining whether an injunction should be granted should be included in this Act.

PIAC supports the inclusion of a provision along the lines of s 12 of the *Human Rights Act 1998* (UK), requiring particular regard to be given to freedom of expression. PIAC also refers the ALRC to its comments in response to Question 1 above, in relation to privacy as a derogable human right.

Other remedies

Response to Question 18

Other than monetary remedies and injunctions, what remedies should be available for serious invasion of privacy under a statutory cause of action?

Breaches of privacy may arise in a wide range of circumstances, and it therefore seems appropriate to enable the court to tailor the remedy to the breach that occurred. PIAC considers that in addition to monetary remedies and injunctions, other remedies that should be available for serious invasion of privacy under a statutory cause of action include:

- an order requiring the defendant to apologise to the plaintiff;
- a correction order;
- an order for the delivery up and destruction of material;
- an order requiring implementation of a policy or procedures;
- a declaration;

- other remedies or orders that the Court thinks appropriate in the circumstances.

The court should be able to develop in case law the circumstances in which individual remedies should be awarded.

PIAC considers that apologies and correction orders can be appropriate remedies in matters involving breaches of privacy. In many of the privacy cases that PIAC has dealt with, the clients have been less concerned with obtaining compensation than they have been with obtaining a comprehensive and meaningful apology from the respondent.

PIAC notes that s 108(2)(d) of the ADA provides that the Administrative Decisions Tribunal (ADT) can order the respondent to publish an apology or a retraction (or both) in respect of the matter the subject of the complaint, and, as part of the order, give directions concerning the time, form, extent and manner of publication of the apology or retraction (or both). PIAC recommends that a similar provision be enacted in any statute dealing with invasion of privacy.

Systemic breaches

It is not uncommon for conduct breaching privacy to be widespread, institutionalised and affect large numbers of people. For example, as mentioned earlier, there are numerous instances in which the media have released personal information about young people who have become involved in the criminal justice system. This impacts adversely on the young people and also on their families.

PIAC notes that s 108(3) of the ADA provides:

An order of the Tribunal may extend to conduct of the respondent that affects persons other than the complainant or complainants if the Tribunal, having regard to the circumstances of the case, considers that such an extension is appropriate.

This enables the ADT to make orders that extend to conduct of the respondent that affects persons other than the person who lodged the complaint. This allows the ADT to address identified situations of systemic discrimination.

PIAC recommends that a similar provision be enacted, enabling the relevant Court or Tribunal that deals with breaches of privacy to deal also with systemic privacy breaches.

PIAC recommends the inclusion of a remedy that expressly gives the court power to order implementation of policy or procedures to protect against repetition of the breach.⁵⁰ PIAC notes that s 108(2)(e) of the ADA allows the ADT to order the respondent to a vilification complaint to develop and implement a program or policy aimed at eliminating unlawful discrimination. PIAC submits that a similar provision in any legislation dealing with invasion of privacy would help to prevent further breaches of privacy and would also assist in bringing about cultural change in organisations that fail to take their privacy obligations seriously.

⁵⁰ Ibid., 27.

Enforceability of non-monetary remedies

In many situations, non-monetary remedies will provide the most appropriate redress for an invasion of privacy. However, in order to ensure that justice is actually achieved for those whose complaints are proven, it will be important to make provision for the enforcement of these non-monetary orders. PIAC notes that non-monetary orders of the ADT can be enforced as a judgment of the Supreme Court once the Registrar of the ADT has filed a certificate setting out the terms of the order.⁵¹ Subsection 108(7) of the ADA allows the ADT to order the respondent to pay the complainant damages not exceeding \$40,000 if the respondent fails to comply with an order of the ADT within a specified time set by the ADT. PIAC supports the inclusion of similar provisions in a statute establishing a cause of action for serious invasion of privacy.

Recommendation

The proposed statutory cause of action should also enable the relevant Court or Tribunal to enforce non-monetary orders, and to address systemic breaches of privacy.

Aside from monetary remedies and injunctions, other remedies that should be available for serious invasion of privacy under the proposed statutory cause of action are:

- *an order requiring the defendant to apologise to the plaintiff;*
- *a correction order;*
- *an order for the delivery up and destruction of material;*
- *an order requiring implementation of a policy or procedures;*
- *a declaration; and*
- *other remedies or orders that the Court thinks appropriate in the circumstances.*

Who may bring a cause of action

Response to Question 19

Should a statutory cause of action for a serious invasion of privacy of a living person survive for the benefit of the estate? If so, should damages be limited to pecuniary losses suffered by the deceased person?

PIAC repeats its comments to the DPM&C⁵² and NSWLRC⁵³ in relation to this question.

PIAC notes that most existing statutory causes of action for invasion of privacy lapse with the death of the person whose privacy has allegedly been invaded.⁵⁴ This can be seen as flowing from the fact that the right to privacy is generally seen as a personal right. It has also been justified on the basis that because the main mischief of an invasion of privacy is the mental harm and injured feelings suffered by an individual, only living individuals should be allowed to seek relief.⁵⁵

⁵¹ *Anti-Discrimination Act 1977* (NSW) s 114.

⁵² Simpson, above n 1, 21-22.

⁵³ Mainsbridge, above n 5, 24-25.

⁵⁴ *Privacy Act* RSBC 1996 c373 (British Columbia) s 5; *Privacy Act* RSNL 1990 cP-22 (Newfoundland and Labrador) s 11; *Privacy Act* RSS 1978 cP-24 (Saskatchewan) s 10; and *Privacy Bill 2006* (Ireland) cl 15.

⁵⁵ Hong Kong Law Reform Commission, *Civil Liability for Invasion of Privacy* (2004) Recommendation 29 [12.24].

However, some actions may have a considerable impact on the privacy of the relatives of a deceased person (for example, the taking of photographs of their remains, or the publication of an article containing embarrassing information about their private life, or the manner in which they died, or the establishment of a dedication page on Facebook). In these circumstances, it is appropriate that the relatives of the deceased person have some means of seeking compensation, or restraining further breaches of privacy. PIAC notes that in France, the right to privacy survives the death of the aggrieved and may be enforced by the family of deceased.⁵⁶

Some invasions of privacy may raise systemic issues that should be addressed, notwithstanding the death of the complainant. When discussing the issue of whether a discrimination complaint should survive the death of a complainant, the NSW Anti-Discrimination Board observed:

Although it will rarely be appropriate for the estate to be awarded damages, the larger issues of principle which are involved should not die with the complainant. For example, policies or practices applied to the complainant may need to be changed so that discrimination does not occur in the future.⁵⁷

There is now provision in the ADA for a complaint to survive the death of a complainant and for the legal personal representative of the complainant to continue carriage of the complaint.⁵⁸

PIAC suggests that consideration be given to including a similar provision in any legislation setting up a statutory cause of action for invasion of privacy, so that an action can be maintained after a person's death, at least in circumstances where important systemic issues are involved. Like discrimination, invasion of privacy can be characterised as a societal wrong. The continuation of a cause of action for invasion of privacy after a person's death may assist in achieving the societal objects of the proposed legislation, regardless of whether or not it results in a personal remedy.

Recommendation

In exceptional circumstances, an action for invasion of privacy should be able to continue after the death of the person whose privacy has been invaded, at least where important systemic issues are involved.

Response to Question 20

Should the Privacy Commissioner, or some other independent body, be able to bring an action in respect of the serious invasion of privacy of an individual or individuals?

PIAC recommends that the Privacy Commissioner, or some other independent body, should be able to bring an action in respect of the serious invasion of privacy of an individual or individuals.

PIAC submits that empowering the Commissioner or some other independent body will have a number of benefits. With any legal requirement, compliance is low unless the threat of action as a result of non-compliance is genuine. Sometimes it is a business calculation, based on weighing

⁵⁶ A Gigante, 'Ice Patch on the information superhighway: foreign liability for domestically created content' (1996) *Cardozo Arts and Entertainment Law Journal* 523 at 543, note 113.

⁵⁷ New South Wales Anti-Discrimination Board, Submission to the New South Wales Law Reform Commission on Review of the *Anti-Discrimination Act 1977* (NSW), Submission 1 (May 1994), 182.

⁵⁸ *Anti-Discrimination Act 1977* (NSW) s 93(1).

up the costs of compliance versus the legal costs should a complaint be made and need to be defended, given that it is unlikely that an individual will bring an action. Empowering a body, and ensuring it is adequately funded to undertake such monitoring, investigation and enforcement activities, will have a deterrent effect and encourage compliance.

In addition, empowering a body to take such action will take the pressure off individuals, such as PIAC's clients, who bring proceedings in the public interest. Moreover, the Commissioner, or some other body, is more suited than individuals to bring cases addressing systemic serious invasions of privacy. Ideally the body would be strategic in the litigation it pursued focusing on areas where compliance is particularly low. Strategic intervention by a body would also assist in the development of privacy law jurisprudence.

Location and forum

Response to Question 22

Should a statutory cause of action for serious invasion of privacy be located in Commonwealth legislation? If so, should it be located in the *Privacy Act 1988* (Cth) or in separate legislation?

PIAC believes that a statutory cause of action for serious invasion of privacy should be located in Commonwealth legislation. This legislation should also make it clear that it extinguishes any common law privacy rights but is in addition to any other privacy rights contained in state or territory legislation. If individual states and territories enact their own legislation dealing with invasions of privacy, there is a danger that levels of protection will be uneven across Australia. This would perpetuate the random, haphazard development that has been a feature of data protection laws and would create confusion and uncertainty for the many organisations and agencies that operate across state borders.

The statutory cause of action could be located either in the *Privacy Act 1988* (Cth) or in separate legislation.

Recommendation

The proposed cause of action should be contained in Commonwealth legislation. This legislation should also state that it abolishes any tort for the invasion or violation of privacy that may have existed at common law.

Response to Question 23

Which forums would be appropriate to hear a statutory cause of action for serious invasion of privacy?

Accessibility is a key factor in considering which forum is appropriate to determine matters under a statutory cause of action for serious invasion of privacy. Otherwise, there is a risk that this type of action would become the sole preserve of those wealthy enough to afford to pay for legal representation and to run the risk of incurring an adverse costs order if they are unsuccessful.

In PIAC's experience, even where pro bono legal representation or representation on a conditional fee basis is secured, many meritorious cases do not proceed due to the risk of an

adverse costs order. This is especially the case in matters where there is a great disparity in resources between the applicant and respondent.

One possibility is that the legislation provide that serious invasion of privacy matters should be heard by the Administrative Appeals Tribunal. This would mean that parties to the matter would generally bear their own costs and that costs orders would only be made in exceptional circumstances.⁵⁹ PIAC notes that the VLRC recommended that the Victorian Civil and Administrative Tribunal be given jurisdiction to hear privacy complaints for similar reasons.⁶⁰

Alternatively, if the ALRC recommends that serious invasion of privacy be dealt with by the federal courts, it should also recommend the inclusion of a provision in the legislation that specifically allows the federal courts to make orders that protect litigants bringing action in the public interest from an adverse costs order. In 1995, the ALRC proposed the introduction of a public interest costs rule.⁶¹ PIAC strongly supports such a provision because it would remove a further barrier that inhibits impecunious people, and organisations bringing public interest proceedings, from litigating.

Recommendation:

The jurisdiction to hear matters for serious invasion of privacy should be vested in the Administrative Appeals Tribunal and the general rule in these proceedings should be that each party must bear its own costs.

If jurisdiction is given to the federal courts, the federal courts should be permitted to make orders that protect litigants bringing action in the public interest from an adverse costs order.

Response to Question 24

What provision, if any, should be made for voluntary or mandatory alternative dispute resolution of complaints about serious invasion of privacy?

PIAC supports a provision for voluntary alternative dispute resolution (ADR) for complaints about serious invasion of privacy.

Despite the numerous benefits of ADR, such as preventing costly and traumatic litigation and promoting earlier settlement of disputes, PIAC considers that ADR should not be seen as a substitute for other dispute resolution options.

ADR often fails to address power disparities between the parties. For example, some consumers may accept a negotiated settlement in order to avoid the risk of adverse costs orders and the stress of litigation, yet by doing so do not have their rights fully realised or the merits of their case properly assessed. It may also be in the interests of an organisation to pay an individual a

⁵⁹ General Practice Direction 2007 under ss 20(2) of the *Administrative Appeals Tribunal Act 1975*, ss20(2) states: 'In general, the parties in Tribunal proceedings must bear their own costs.'

⁶⁰ VLRC, above n 27, 7.122.

⁶¹ Australian Law Reform Commission, *Cost shifting – who pays for litigation*, ALRC Report 75 (1995). For further explanation of this proposal, see PIAC's recent submission to the NSW Law Reform Commission, *A public interest approach to costs*, NSW Law Reform Commission Inquiry <http://www.piac.asn.au/sites/default/files/publications/extras/10.03.03-PIAC_Sub1-NSWLRC_re_Costs.pdf>, 4-7.

confidential settlement rather than risk having a test case judgment made against them, which would be costly if applied to a large volume of consumers. Such settlements have a detrimental effect on other similarly affected consumers as each must take separate legal action, whereas a court determination would provide a clear and public precedent and would be likely to result in a change in policy or conduct without the need for further legal action. Any requirement to participate in ADR processes must consider these power inequalities between parties, preferably through court oversight.

Parties participating in ADR processes ideally should have access to independent legal advice. In court proceedings, the disadvantage experienced by unrepresented parties can at least be partially compensated for by judges and by the procedural and substantive safeguards built into the litigation process. Unfortunately, many potential litigants are unlikely to have the funds to engage a solicitor for ADR processes.

In contrast to court hearings, ADR processes are usually conducted in private and resolutions are generally confidential. Neither the reason for a dispute nor the basis upon which it is resolved need be made public. Disputes settled through ADR thus do not allow for laws to be tested and have less capacity to achieve legal precedents or significant public interest outcomes.

Recommendation

PIAC recommends that it should be up to the parties to determine if ADR is appropriate for a complaint about serious invasion of privacy.