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

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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;
- 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 NSW Trade & Investment 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

As was noted in our submission to the *Issues Paper*,[1] 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).

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 privacy[2] and the Unified

1 Jessica Roth and Edward Santow, *Serious invasions of privacy in the digital era: submission to the Australian Law Reform Commission* (14 November 2013) Public Interest Advocacy Centre <http://www.piac.asn.au/publication/2013/12/serious-invasions-privacy-digital-era>.

2 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,[3] the Australian Law Reform Commission (ALRC) in response to its Discussion paper 72,[4] and the NSW Law Reform Commission (NSWLRC) in response to Consultation Paper 3[5] and Consultation Paper 1.[6]

This submission draws on PIAC's earlier submission to the ALRC in response to its Issues Paper, as well as submissions to the DPM&C 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.

PIAC gratefully acknowledges the assistance provided by University of Sydney student, Prajesh Shrestha, in preparing this submission.

PIAC's response to ALRC Proposals and Questions

4: A New Tort in a New Commonwealth Act

Proposal 4-1

A statutory cause of action for serious invasion of privacy should be contained in a new Commonwealth Act (the new Act).

PIAC supports the ALRC's proposal that the statutory cause of action be contained in a new, stand-alone Commonwealth Act.

This legislation should also make it clear that it extinguishes any common law privacy rights and replaces 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.

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3 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>.

4 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>.

5 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>.

6 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>.

Proposal 4-2

The cause of action should be described in the new Act as an action in tort.

PIAC previously submitted to the VLRC that the cause of action should be expressed in terms of a right of action for invasion of privacy and not as a tort. However, PIAC accepts the ALRC's argument for why it should be a tort and, as a result, PIAC supports proposal 4-2.

5: Two Types of Invasion and Fault

Proposal 5-1: First Element of Action

The new tort should be confined to invasions of privacy by:

a) **intrusion upon the plaintiff's seclusion or private affairs (including by unlawful surveillance); or**
b) **misuse or disclosure of information about the plaintiff (whether true or not).**

PIAC previously suggested that the Act should contain a non-exhaustive list of examples of conduct that may be an invasion of privacy. 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. PIAC believes there needs to be sufficient flexibility in the Act for it to be appropriately adapted to changing social and technological circumstances. Providing a conclusive definition of the term 'privacy' limits this flexibility.

However, the term 'confined' in proposal 5-1 implies that it is an exhaustive definition and seems to represent a departure from the ARLC's previous approach. Given that ALRC recommendations are often used as the basis for legislative drafting instructions, PIAC submits that the wording of proposal 5-1 should be amended to make clear that the definition is not intended to be exhaustive.

Having said that, PIAC also acknowledges the benefits of defining the cause of action, and indeed delimiting at least some of its boundaries. .

In this regard, PIAC supports the inclusion of the two forms of invasion of privacy listed in proposal 5-1. In relation to (a), PIAC considers that any act that intrudes upon the privacy or seclusion of the plaintiff should come within the cause of action. It is appropriate that it is not limited to an individual's home or family life, as sometimes conduct that is invasive of privacy takes place outside this realm. PIAC also endorses the specific inclusion of 'unlawful surveillance' as PIAC believes that there should be an invasion of privacy if a person discloses information, documentation or material obtained by unauthorised surveillance.

In relation to (b), PIAC agrees that the term 'information' is preferable to 'facts' as it does not imply that the material must be true.

PIAC is concerned that the cause of action should extend to physical privacy intrusions such as unreasonable search and seizure, or media harassment. These physical privacy intrusions may not necessarily result in disclosure of private information, but may nonetheless amount to

arbitrary or unlawful interference with privacy.[7] Separating (a) and (b) in the way proposed by the ALRC appears to cover physical privacy intrusions upon the plaintiff's seclusion.

Proposal 5-2: Second element of action

The new tort should be confined to intentional or reckless invasions of privacy. It should not extend to negligent invasions of privacy, and should not attract strict liability.

PIAC acknowledges that strict liability is relatively rare in Australia today and there are convincing reasons why the new tort should not attract strict liability.

However, PIAC is not convinced that the tort should be confined to intentional or reckless invasions of privacy; rather it should extend to negligent invasions of privacy. 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.

As PIAC submitted previously, 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 unknowingly release personal information about a number of its clients. It is undesirable that victims of these privacy breaches should have no legal recourse.

PIAC acknowledges that data security breaches could give rise to other causes of action; however, PIAC believes that restricting liability to reckless or intentional acts may provide inadequate encouragement to organisations to take steps to ensure that their privacy management systems are adequate.

As is the case with other laws that protect against breaches of fundamental human rights, such as anti-discrimination 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.

PIAC notes that the VLRC agreed that there might 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.[8]

PIAC does not agree with the ALRC that there is a potential problem of incoherence of the legislation. Even though liability for negligence does not normally extend to emotional distress, there does not appear to be a convincing reason of principle why it should not do so in relation to privacy. PIAC believes the cause of action should include a remedy for emotional distress and that there should be liability for negligence.

The ALRC suggests that the new tort should only be actionable where the defendant intended to invade the plaintiff's privacy. However, PIAC believes that this will remove liability for serious breaches of privacy in too many circumstances.

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7 Mainsbridge, above n 4, 23-24.

8 Victorian Law Reform Commission (VLRC), *Surveillance in Public Places*, Report No 18 (2010) [7.143].

To continue with the example the ALRC uses at paragraph 5.87, if a media entity does not intend to invade a person's privacy but inadvertently does so as a result of publishing a story, the media entity should be liable.

Proposal 5-3 & Proposal 5-4

The new Act should provide that an apology made by or on behalf of a person in connection with any invasion of privacy alleged to have been committed by the person:

a) **does not constitute an express or implied admission of fault or liability by the person in connection with that matter; and**
b) **is not relevant to the determination of fault or liability in connection with that matter.**

Evidence of an apology made by or on behalf of a person in connection with any conduct by the person is not admissible in any civil proceedings as evidence of the fault or liability of the person in connection with that matter.

PIAC agrees that in some circumstances, an apology that something has occurred may provide a sufficient response to appease someone whose privacy has been invaded and that people should feel free to make an apology without it affecting their ultimate potential liability.

6: A Reasonable Expectation of Privacy

Proposal 6-1: Third element of action

The new tort should only be actionable where a person in the position of the plaintiff would have had a reasonable expectation of privacy, in all of the circumstances.

PIAC supports the proposal of the ALRC that the tort should only be actionable where a person in the position of the plaintiff would have had a 'reasonable expectation of privacy, in all of the circumstances.' PIAC agrees that the test should be an objective one.

PIAC agrees that there is significant case law about reasonableness and also reasonable expectation, and it is sufficiently clear.

PIAC agrees with the ALRC that the 'highly offensive' test is undesirable. Whether the conduct is 'highly offensive' may be a relevant consideration as part of determining whether there is a reasonable expectation of privacy.

Proposal 6-2

The new Act should provide that, in determining whether a person in the position of the plaintiff would have had a reasonable expectation of privacy in all of the circumstances, the court may consider, among other things:

a) **the nature of the private information, including whether it relates to intimate or family matters, health or medical matters, or financial matters;**
b) **the means used to obtain the private information or to intrude upon seclusion, including the use of any device or technology;**
c) **the place where the intrusion occurred;**
d) **the purpose of the misuse, disclosure or intrusion;**
e) **how the private information was held or communicated, such as in private correspondence or a personal diary;**
f) **whether and to what extent the private information was already in the public domain;**
g) **the relevant attributes of the plaintiff, including the plaintiff's age and occupation;**
h) **whether the plaintiff consented to the conduct of the defendant; and**
i) **the extent to which the plaintiff had manifested a desire not to have his or her privacy invaded.**

PIAC supports the inclusion of a non-exhaustive list of matters that a court may consider in determining whether a person in the position of the plaintiff would have had a reasonable expectation of privacy in all of the circumstances.

PIAC endorses the inclusion of all nine matters outlined in the proposal. PIAC suggests that 'cultural background' should be specifically added to consideration (g). Just as age and occupation are relevant attributes, a person's cultural background may be relevant to the reasonable expectations of privacy in the circumstances. PIAC has significant experience working with Aboriginal and Torres Strait Islander Australians and is aware that there are cultural expectations of privacy that may be relevant and require consideration.

PIAC is concerned at the simple phrasing of consideration (h) – 'whether the plaintiff consented to the conduct of the defendant' – because the issue of consent is complex. As PIAC has submitted previously, 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. Consideration of whether the plaintiff consented to the conduct of the defendant 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 also agrees with the NSWLRC that the 'extent to which the individual is or was in a position of vulnerability' should be a consideration.[9] PIAC accepts that this may not be an 'attribute' of the plaintiff per se, but perhaps it should be its own tenth consideration. As the ALRC says,

[9] NSW Law Reform Commission, *Invasion of Privacy,* Report No 120 (2009) Draft Bill cl 74(3)(a)(v).

vulnerability may suggest information is private, as well as increasing the offensiveness and harm of an invasion of privacy.[10]

7. Seriousness and Proof of Damage

Proposal 7-1: Fourth element of action

The new Act should provide that the new cause of action is only available where the court considers that the invasion of privacy was 'serious'. The new Act should also provide that in determining whether the invasion of privacy was serious, a court may consider, among other things, whether the invasion of privacy was likely to be highly offensive, distressing or harmful to a person of ordinary sensibilities in the position of the plaintiff.

PIAC agrees that the cause of action should only be available when the court considers that the invasion of privacy was 'serious', although PIAC does not believe it should be a separate, stand-alone element of the action. PIAC believes that it should be a relevant consideration regarding the nature of the conduct, rather than a separate element of the threshold test.

The ALRC has used the phrase 'among other things', which seems to indicate an intention to provide a non-exhaustive list of considerations in determining whether the invasion of privacy was serious. PIAC suggests that in practice, however, a court is likely to consider this a de facto exhaustive definition, as there is only one consideration and not a series of indicia. If it is a definition, PIAC suggests that the phrasing should make it clear that it is a definition. Alternatively, there should be other considerations listed.

PIAC agrees with the ALRC's suggestion that 'likely' should mean a 'real possibility', not 'probable'. However, PIAC suggests that this should be made clear, rather than leaving it to the courts to interpret.

In determining whether the invasion of privacy was serious, PIAC believes that considering whether the invasion of privacy was likely to be 'highly' offensive, distressing or harmful sets the bar too high. PIAC refers 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.[11]

PIAC considers that an appropriate test of seriousness may be where the act complained of was likely to be regarded as offensive, distressing or harmful 'to a reasonable person of ordinary sensibilities in the position of the plaintiff.' PIAC suggests that the word 'highly' is not included. In addition to offence, the level of distress and harm are both suitable matters to consider.

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10 Australian Law Reform Commission (ALRC), *Serious invasions of privacy in the digital era*, Discussion paper 80, 2014, para 6.47.

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

Proposal 7-2

The plaintiff should not be required to prove actual damage to have an action under the new tort.

PIAC supports the recommendation that the proposed tort is actionable without proof of damage.

As PIAC has submitted previously, 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. 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. Privacy is a fundamental human right; it should not be necessary to prove damage arising from its breach.

8. Balancing privacy and other interests

Proposal 8-1: Fifth element of action

The new Act should provide that the plaintiff only has a cause of action for serious invasion of privacy where the court is satisfied that the plaintiff's interest in privacy outweighs the defendant's interest in freedom of expression and any broader public interest. A separate public interest defence would therefore not be needed.

PIAC agrees that privacy is not an absolute right, and that other interests may, in some cases, outweigh a plaintiff's interest in privacy. PIAC acknowledges that public interest must be considered at some stage in an action for breach of privacy.

However, PIAC disagrees with the proposal that the different public interests should be incorporated into the cause of action itself. As PIAC has submitted to the ALRC previously, this 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.

Instead, PIAC considers it more appropriate that competing public interest should be one of a number of defences to the proposed cause of action. In this respect, PIAC favours a 'legitimate public concern' test as was applied in the New Zealand case of *Hosking v Runting.*[12]

Furthermore, PIAC agrees with the VLRC's recommendation that public interest is a limited concept and not any matter that the public may be interested in.[13] As such, the wording of the proposal which includes 'any broader public interest' may be too wide and all-encompassing.

PIAC considers that freedom of expression should be one public interest factor that may qualify an otherwise actionable invasion of privacy.

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12 [2005] 1 NZLR 1.

13 VLRC, above n 8, 7.187.

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

Proposal 8-2

The new Act should include the following non-exhaustive list of public interest matters which a court may consider:
(a) freedom of expression, including political communication;
(b) freedom of the media to investigate, and inform and comment on matters of public concern and importance;
(c) the proper administration of government;
(d) open justice;
(e) public health and safety;
(f) national security;
(g) the prevention and detection of crime and fraud; and
(h) the economic wellbeing of the country.

PIAC supports the inclusion in the Act of a non-exhaustive list of public interest matters that a court may consider. The term 'public interest' is not easy to define.

PIAC supports the eight factors listed in proposal 8-2, but suggests that the list is unbalanced in that it contains only matters *opposed to* the protection of privacy. As the ALRC says itself,[14] privacy is also a matter of public interest. There is nothing in the list that addresses the public interests underlying the protection of privacy, such as the protection of individual autonomy and the dignity that underpins privacy and other human rights.

The ALRC says that the public interest in respecting privacy should be considered in the proposed balancing exercise. PIAC suggests that these public interests should be explicitly listed so as to avoid a potential misinterpretation of the term 'public interest'.

9. Forums, Limitations and Other Matters

Proposal 9-1

Federal, state and territory courts should have jurisdiction to hear an action for serious invasion of privacy under the new Act.

PIAC supports the proposal for federal, state and territory courts to have jurisdiction to hear an action for serious invasion of privacy under the new Act.

However, PIAC notes that there are substantial costs barriers to bringing action in federal courts. PIAC recommends that the ALRC 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. This is discussed further in response to Question 11-1.

[14] ALRC, above n 10, 8.50.

Question 9-1

If state and territory tribunals should also have jurisdiction, which tribunals would be appropriate and why?

PIAC acknowledges that the power of the Australian Parliament to vest federal jurisdiction in state courts under s 77(iii) of the Constitution may not extend to tribunals. If it were possible for tribunals to be vested with federal jurisdiction, PIAC would suggest that in NSW, the NSW Civil and Administrative Tribunal (NCAT) should have jurisdiction.

NCAT is designed to be more accessible than the courts and PIAC is of the view that any new Act should be able to be effectively used. As the VLRC noted in its 2010 report, the sums of money involved do not usually justify the level of legal costs that are usually associated with civil litigation in the courts.[15]

Proposal 9-2

The new Act should provide that the new tort be limited to natural persons.

PIAC supports the proposal that the new tort be limited to natural persons. Actions in defamation, which are analogous to privacy actions, are also generally limited to living, natural persons.

The ALRC sensibly says that an action in privacy is designed to remedy a personal, dignitary interest and PIAC agrees it would be incongruous to assign this interest to a corporation or other body.

Proposal 9-3

A cause of action for serious invasion of privacy should not survive for the benefit of the plaintiff's estate or against the defendant's estate.

PIAC has previously submitted that, 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. Exceptional circumstances include situations where important systemic issues are involved. As an invasion of privacy is a societal (as well as an individual) 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.

PIAC notes that most existing statutory causes of action for invasion of privacy lapse with the death of the person whose privacy has been allegedly invaded.[16] 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.[17]

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15 VLRC, above 8, [7.226].

16 *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.

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

However, as PIAC has previously submitted in response to the Issues Paper, some actions may have a considerable impact on the privacy of the relatives of a deceased person. In these rare circumstances, it is appropriate that the relatives of the deceased person have some means of seeking compensation, or restraining further breaches of privacy.

Some invasions or 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.[18]

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.[19] PIAC suggests that a similar provision be included in the new Act, although PIAC acknowledges that it may be very rarely used.

Proposal 9-4

A person should not be able to bring an action under the new tort after either (a) one year from the date on which the plaintiff became aware of the invasion of privacy, or (b) three years from the date on which the invasion of privacy occurred, whichever comes earlier. In exceptional circumstances the court may extend the limitation period for an appropriate period, expiring no later than three years from the date when the invasion occurred.

PIAC supports this proposal and acknowledges point (a) is consistent with the one-year limitation period prescribed for actions in defamation.

However, PIAC suggests that the court should be given discretion to extend the limitation period beyond three years in exceptional circumstances. At paragraph 9.69, the ALRC outlines all the factors a court may consider in granting an extension at common law: whether the justice of the case requires that the application be granted, whether a fair trial is possible by reason of the time that has elapsed since the events giving rise to the cause of action, the length of delay and any explanation for it, and whether a respondent is prima facie prejudiced by being deprived of the protection of the limitation period.[20] There are a number of reasons why a plaintiff may legitimately wait a longer period than three years, so a court should have discretion to take those matters into account and formulate its own limitation period.

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18 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.

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

20 *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541, quoted in ALRC Discussion Paper, paragraph 9.69.

Proposal 9-5

The new Act should provide that, in determining any remedy, the court may take into account:

a) **whether or not a party took reasonable steps to resolve the dispute without litigation; and**
b) **the outcome of any alternative dispute resolution process.**

PIAC supports proposal 9-5 and the encouragement to engage in alternative dispute resolution (ADR), without making this mandatory. 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 an automatic substitute for other dispute resolution options.

PIAC previously recommended that it should be a matter for the parties to determine if ADR is appropriate in relation to a complaint about serious invasion of privacy. Proposal 9-5 facilitates that choice.

10. Defences and exemptions

Proposal 10-1

The new Act should provide a defence of lawful authority.

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

PIAC acknowledges that the ALRC has not provided guidance on the meaning of 'lawful authority' as this may well be a drafting issue. As the ALRC has said it welcomes response on the wording of the defence, PIAC believes that the exception should be clarified.

PIAC suggests that that the wording of the defence should make clear that 'lawful authority' must be specific, in the sense that the legislation in question must specifically state that it is not necessary to comply with the new Act in the relevant circumstances. This would ensure that the legislature has had the opportunity to consider the competing public interest considerations and resolved that the privacy interest should be diminished to accommodate the other interest to which it is opposed.

Proposal 10-2

The new Act should provide a defence for conduct incidental to the exercise of a lawful right of defence of persons or property where that conduct was proportionate, necessary and reasonable.

PIAC supports this proposal as it is consistent with privacy's status as a human right, recognised at international law. As PIAC submitted previously, 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.[21]

PIAC recommends that this defence should include the situation where 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.

Proposal 10-4

The new Act should provide for a defence of qualified privilege to the publication of private information where the defendant published matter to a person (the recipient) in circumstances where:

a) **the defendant had an interest or duty (whether legal, social or moral) to provide information on a subject to the recipient; and**
b) **the recipient had a corresponding interest or duty in having information on that subject; and**
c) **the matter was published to the recipient in the course of giving to the recipient information on that subject.**

The defence of qualified privilege should be defeated if the plaintiff proves that the conduct of the defendant was actuated by malice.

PIAC considers that the defence of qualified privilege is unnecessary.

The defence of qualified privilege at common law protects a defamatory statement made on an occasion where one person has a duty or interest to make the statement and the recipient of the statement has a corresponding duty or interest to receive it. Communications made on such occasions are privileged because their making promotes the welfare of society.

Although public interest is not synonymous with privilege, it is conceivable that the broader public interest consideration (which PIAC suggests should be framed as a defence) will negate most causes of action for invasion of privacy for the 'welfare of society'.

Proposal 10-5

The new Act should provide for a defence of publication of public documents.

As PIAC has submitted previously, 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.[22] 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

[21] UN Human Rights Committee, General Comment No. 29 - States of Emergency (Article 4), [4].
[22] NSWLRC, above n 9, 19-20.

records, access to them may be constrained in reality by practical and logistical constraints, such as the need to pay a fee.[23]

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.[24] In cases such as this, the plaintiff should not be denied a remedy.

Question 10-2

Should the new Act provide for a defence of necessity?

PIAC recommends that the new Act does not provide for a defence of necessity. If public interest is its own defence to the proposed cause of action, that defence would cover the circumstances outlined in paragraph 10.60 of the Issues Paper.

Proposal 10-7

The new Act should provide a safe harbour scheme to protect internet intermediaries from liability for serious invasions of privacy committed by third party users of their service.

PIAC supports proposal 10-7 as a safe harbour scheme for internet intermediaries is necessary for a number of reasons.

Imposing liability on internet intermediaries for serious invasions of privacy by third parties may impose onerous obligations on platforms to review and moderate user-generated content.

The cost to online businesses of reviewing third party content before it appears on the website would be prohibitive. There are comparable 'safe harbours' at US and European law.

11. Remedies and costs

Proposal 11-1

The new Act should provide that courts may award compensatory damages, including damages for the plaintiff's emotional distress, in an action for serious invasion of privacy.

PIAC strongly supports the proposal that courts may award compensatory damages. Specifically, PIAC supports the Act clearly providing that a court may award damages for 'mere' emotional distress. This is a common consequence of serious invasions of privacy and should be covered by the Act.

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

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

Proposal 11-5

The new Act should provide that, in an action for serious invasion of privacy, courts may award exemplary damages in exceptional circumstances and where the court considers that other damages awarded would be an insufficient deterrent.

PIAC supports the courts having discretion to award exemplary damages in exceptional circumstances. There are a number of circumstances where an invasion of privacy may be of such a malicious or high-handed manner that it warrants an award of exemplary damages. PIAC also supports the award of exemplary damages where other damages awarded would be an insufficient deterrent.

However, the drafting of the provision should make it clear that these two grounds for exemplary damages do not both have to be met for the award of exemplary damages. Although the threat of exemplary damages may serve as a deterrent, this is not the sole purpose of exemplary damages. If the court considers that other damages awarded would be an insufficient deterrent, the court should be able to award exemplary damages. Alternatively, if exceptional circumstances justify it, the court should be able to award exemplary damages. It should not be necessary to satisfy both grounds in proposal 11-5.

Proposal 11-6

The total of any damages other than damages for economic loss should be capped at the same amount as the cap on damages for non-economic loss in defamation.

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 imposition of a 'cap'. As PIAC has submitted previously, 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. Furthermore, 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, PIAC supports them being set in accordance with defamation legislation given that this protects an analogous right.

Proposal 11-7

The new Act should provide that a court may award the remedy of an account of profits.

PIAC also 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.

Proposal 11-9

The new Act should provide that courts may award an injunction, in an action for serious invasion of privacy.

PIAC supports the availability of an injunction as a remedy. PIAC notes that the ALRC discusses the matters a court must consider when determining whether to grant an injunction to protect an individual from a serious invasion of privacy in the context of Proposal 12-2.

Since PIAC has chosen not to respond to Proposal 12-2, PIAC suggests here 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.

Proposal 11-10

The new Act should provide that courts may order the delivery up and destruction or removal of material, in an action for serious invasion of privacy.

PIAC supports the inclusion of a provision stating that courts may order the delivery up and destruction or removal of material, in an action for serious invasion of privacy.

However, the ALRC has not proposed an order that requires a defendant to rectify its business or IT practices to redress systemic problems with the way it stores information. The ALRC notes that these systemic problems would generally be the result of negligent acts or omissions.[25]

PIAC recommends that the cause of action includes negligent acts or omissions, and not be confined to intentional or reckless invasions of privacy, and so PIAC again suggests that the court should be able to make an order to address systemic breaches.

As PIAC has said previously, it is not uncommon for conduct breaching privacy to be widespread, institutionalised and affect large numbers of people. For example, 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 recommends that a similar provision to s 108(3) of the ADA be inserted into the Act enabling the relevant court or tribunal to deal also with systemic privacy breaches. This would enable the court or tribunal to make orders that extend to conduct of the respondent that affects persons other than the person who lodged the complaint. It also allows the court to address identified situations of systemic discrimination.

As PIAC has submitted previously, PIAC also 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.[26] PIAC notes that s 108(2)(e) of the ADA allows NCAT 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 the Act dealing with

[25] ALRC, above n 10, [11.69].

[26] Mainsbridge, above n 6, 27.

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.

Proposal 11-11 & Proposal 11-12

The new Act should provide that courts may make a correction order, in an action for serious invasion of privacy.

The new Act should provide that courts may make an order requiring the defendant to apologise to the plaintiff, in an action for serious invasion of privacy.

PIAC considers that correction orders and apologies can be appropriate remedies in matters involving breaches of privacy and the new Act should provide for both of these remedies. In many of PIAC's privacy cases, 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 NCAT 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.

PIAC also suggests that the new Act should provide that a court may make other orders that the court thinks appropriate in the circumstances. PIAC believes the court should be able to develop in case law the circumstances in which individual remedies should be awarded, and should also have residual discretion.

In relation to Proposals 11-9, 11-10, 11-11, 11-12 and 11-13, PIAC acknowledges that in many situations, these non-monetary remedies will provide the most appropriate redress for an invasion of privacy. However, as PIAC has submitted previously, in order to ensure that justice is actually achieved for those whose complaints are proven, it is important to make provision for the enforcement of these non-monetary orders. PIAC notes that non-monetary orders of NCAT can be enforced as a judgment of the Supreme Court once the Registrar of NCAT has filed a certificate setting out the terms of the order.[27] Subsection 108(7) of the ADA allows NCAT to order the respondent to pay the complainant damages not exceeding $40,000 if the respondent fails to comply with an order of NCAT within a specified time set by NCAT. PIAC supports the inclusion of similar provisions in an Act establishing a cause of action for serious invasion of privacy.

Question 11-1

What, if any, provisions should the ALRC propose regarding a court's power to make costs orders?

The issue of costs is fundamental in ensuring access to justice.

[27] *Anti-Discrimination Act 1977* (NSW) s 114.

PIAC supports the introduction of a public interest costs rule as such a provision would remove a further barrier that inhibits impecunious people, and organisations bringing public interest proceedings, from litigating. In 1995, the ALRC proposed the introduction of a public interest costs rule.[28]

In the absence of such a costs rule, there is a risk that privacy-related litigation 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 in the event 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.

12. Breach of Confidence Actions for Misuse of Private Information

Proposal 12-1

If a statutory cause of action for serious invasion of privacy is not enacted, appropriate federal, state, and territory legislation should be amended to provide that, in an action for breach of confidence that concerns a serious invasion of privacy by the misuse, publication or disclosure of private information, the court may award compensation for the claimant's emotional distress.

If the proposed cause of action cannot be enacted, PIAC supports the proposal for the protection provided by the breach of confidence action to be enhanced by enabling compensation for emotional distress. Providing statutory confirmation that compensation could be awarded for emotional distress would strengthen the existing action for breach of confidence, making it a more useful response to serious invasion of privacy.

Normann Witzlebb states that in the absence of a particular statute, breach of confidence will continue to act as Australia's quasi-privacy tort.[29]

14. Harassment

Proposal 14-1

A Commonwealth harassment Act should be enacted to consolidate and clarify existing criminal offences for harassment and, if a new tort for serious invasion of privacy is not enacted, provide for a new statutory tort of harassment. Alternatively, the states and territories should adopt uniform harassment legislation.

If a new tort for serious invasion of privacy is not enacted, PIAC supports a new statutory tort of harassment. PIAC believes that it would probably be constitutionally possible to enact a

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[28] 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.

[29] Normann Witzleb, 'Giller v Procopets: Australia's Privacy Protection Shows Signs of Improvement' (2009) 17 *Torts Law Journal* 121, 123-124.

Commonwealth harassment Act, as the sexual harassment provisions in the *Sex Discrimination Act 1984* (Cth) are supported by a number of heads of power.

Regardless of the outcome of a new statutory tort for serious invasion of privacy, PIAC supports the proposal for a new Commonwealth harassment act to consolidate and clarify existing criminal offences for harassment. The current state legislation varies considerably and there are provisions relating to harassment in a number of different Commonwealth acts. Consolidating this into one act would be beneficial, as long as there is no reduction in existing protections. The consolidation process must clarify and enhance protections where necessary, rather than adopting a 'lowest common denominator' approach

15. New Regulatory Mechanisms

Proposal 15-3

The *Privacy Act 1988 (*Cth) should be amended to confer the following additional functions on the Australian Information Commissioner in relation to court proceedings relating to interferences with the privacy of an individual:

a) **assisting the court as amicus curiae, where the Commissioner considers it appropriate, and with the leave of the court; and**
b) **intervening in court proceedings, where the Commissioner considers it appropriate, and with the leave of the court.**

PIAC supports the ability of the Australian Information Commission to assist the court as amicus curiae or intervene in court proceedings. In fact, PIAC believes that assisting the court as amicus curiae or intervening in court proceedings should not be limited to the Australian Information Commissioner. There may be other public interest organisations where assisting the court as amicus curiae or intervening in court proceedings would be appropriate.

The Supreme Courts of Canada and the United States of America, as well as the Constitutional Court of South Africa, have welcomed submissions from public interest organisations and others, and have created court rules to accommodate and facilitate the participation of amici in cases raising important issues of public policy. In 1996, the Australian Law Reform Commission proposed a new framework designed to facilitate the involvement of amici and interveners in litigation before the courts in Australia.[30] In 2002, Order 6 Rule 17 and Order 52 Rule 14AA were inserted into the Federal Court Rules by the Federal Court Amendment Rules 2002 (No 2) (SR 222 of 2002). Unfortunately the superior courts have been reticent to grant leave to amici or interveners.

Previously, PIAC also recommended 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, not just serve as an amici or intervener.

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

[30] Australian Law Reform Commission, *Behind the Door Keeper: Standing to Sue for Public Remedies*, Report No 78 (1996).

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 better 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.