



Australian Government

Office of the Australian Information Commissioner

Serious Invasions of Privacy in the Digital Era

Submission to the Australian Law Reform Commission

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Executive summary

- i. The Office of the Australian Information Commissioner (OAIC) welcomes the release by the Australian Law Reform Commission (ALRC) of Issues Paper 43: 'Serious Invasions of Privacy in the Digital Era' (Issues Paper).

Summary of key responses

- ii. This submission contains the OAIC's general comments on a mechanism to protect against serious invasion of privacy, and the OAIC's comments in response to each Issues Paper question. Key general comments and responses are outlined below.

General comments

- iii. There are three key challenges in developing a mechanism to effectively protect against serious privacy invasion: balancing privacy against other public interests, ensuring an accessible mechanism, and ensuring an adaptable mechanism. The OAIC supports the development of a mechanism that meets these three challenges.
- iv. Considerable attention has been given to a cause of action actionable only to the courts. The OAIC is concerned a court action will not meet the key challenge of ensuring an accessible mechanism. Question 27 of the Issues Paper asks in what other ways current laws and regulatory frameworks might be amended to better prevent or redress serious privacy invasions. The OAIC considers that serious invasions of privacy would be best addressed by amending the existing regulatory framework in the *Privacy Act 1988 (Cth)* (Privacy Act) to extend the complaints framework in that Act to cover serious invasions of privacy.
- v. The OAIC therefore recommends adoption of a model where the initial dispute resolution option for a person alleging an invasion of privacy is to complain to the OAIC (Complaints Model for Privacy Invasion). The strength of this model is that it meets the key challenge of ensuring an accessible mechanism, and it builds on the existing Privacy Act model by using the OAIC's existing expertise and experience in complaint conciliation.
- vi. The new provisions should be incorporated into the Privacy Act, with alleged breaches being investigated under Part V of the Privacy Act and existing remedies being available. The courts would play a role where questions of law are referred for rulings, and when the OAIC terminates a complaint on the ground that it involves a matter of public importance that should be considered by the courts.
- vii. An alternative way to amend the current framework to better prevent or redress serious privacy invasion is to extend the Privacy Act to selected bodies and activities that are currently excluded. However, the improvements delivered by this approach would be limited to information privacy.
- viii. If the Complaints Model for Privacy Invasion is not adopted, and some or all Privacy Act exemptions are not removed, the OAIC supports a statutory cause of action.
- ix. Given the Issues Paper's primary focus on a court action, the OAIC has followed the style of the questions which are addressed to creating a cause of action. However,

the OAIC notes at many points that the question can equally be posed in terms of creating a new redress mechanism or cause of action.

Responses to Issues Paper questions

- x. The OAIC generally agrees with the suggested guiding principles for reform, but suggests that 'privacy as a value' should be reframed as 'privacy as a right' in recognition of Australia's obligations as a party to the International Covenant on Civil and Political Rights.
- xi. A privacy invasion redress mechanism is needed because current legislation does not fully implement Australia's international privacy obligations. The OAIC supports a single, comprehensive cause of action (or complaints mechanism) and cautions against framing a mechanism by reference to specific acts or practices, as the resulting mechanism may quickly date and provide narrow and inflexible coverage.
- xii. The right to privacy is not absolute and weighing privacy rights against other public interests is critical to any privacy invasion redress mechanism. The balancing of interests should be integrated into the action (rather than being a defence).
- xiii. The OAIC suggests that the cause of action (or right to complain) should:
 - only be available where the individual had a reasonable expectation of privacy, and the act or conduct would be objectively offensive to a reasonable person
 - not specify a fault element
 - be actionable without proof of damage.
- xiv. The OAIC considers that exemptions are not required as the elements of the action, together with defences, provide adequate safeguards against unmeritorious claims.
- xv. The OAIC supports the availability of a broad range of remedies.
- xvi. The OAIC suggests that, instead of being able to bring actions on behalf of affected individuals, the OAIC should have the power to intervene in proceedings or seek leave to act as *amicus curiae*.
- xvii. Any cause of action (or right to complain) should be located in Commonwealth legislation. The Complaints Model for Privacy Invasion should be included in the Privacy Act, but further thought should be given to the location of a cause of action.
- xviii. The OAIC suggests that the Federal courts (and possibly Federal administrative review tribunals) should be granted jurisdiction to hear matters arising under a cause of action (or that progress from an initial complaint investigation).
- xix. The OAIC supports the inclusion of mechanisms which encourage the early resolution of disputes. The Complaints Model for Privacy Invasion provides privacy complaint conciliation using the OAIC's existing processes and expertise.
- xx. While an individual should be free to choose the basis on which they bring their complaint, they should not be permitted to twice seek relief for the same conduct.
- xxi. In the absence of the Complaints Model for Privacy Invasion (or a statutory cause of action), the OAIC cautions against supplementing existing law by taking a piecemeal approach to fill in the gaps. Consideration could instead be given to how existing mechanisms can be used to protect individuals against serious invasions of privacy.

Introduction

The Office of the Australian Information Commissioner (OAIC) welcomes the Australian Law Reform Commission's release of Issues Paper 43: Serious invasions of privacy in the digital era (Issues Paper).¹

The Office of the Australian Information Commissioner

The OAIC was established by the *Australian Information Commissioner Act 2010* (Cth) (the AIC Act) and commenced operation on 1 November 2010.

The OAIC is an independent statutory agency headed by the Australian Information Commissioner. The Information Commissioner is supported by two other statutory officers: the Freedom of Information Commissioner and the Privacy Commissioner.

The former Office of the Privacy Commissioner was integrated into the OAIC on 1 November 2010.

The OAIC brings together the functions of information policy and independent oversight of privacy protection and freedom of information (FOI) in one agency, to advance the development of consistent workable information policy across all Australian government agencies.

The Commissioners of the OAIC share two broad functions:

- the FOI functions, set out in s 8 of the AIC Act — providing access to information held by the Australian Government in accordance with the *Freedom of Information Act 1982* (Cth), and
- the privacy functions, set out in s 9 of the AIC Act — protecting the privacy of individuals in accordance with the *Privacy Act 1988* (Cth) (the Privacy Act) and other legislation.

The Information Commissioner also has the information commissioner functions, set out in s 7 of the AIC Act. Those comprise strategic functions relating to information management by the Australian Government.

Structure of this submission

The OAIC's comments on the Issues Paper are structured as follows:

- the 'Executive Summary' above noting the OAIC's key general comments and responses
- the 'General comments' section discussing the OAIC's preference for a complaints model to address serious privacy invasion, rather than a court action
- the 'Comments in response to Issues Paper questions' section outlining the OAIC's comments in response to each question raised in the Issues Paper.

¹ *Serious Invasions of Privacy in the Digital Era – Issues Paper 43*, available at <http://www.alrc.gov.au/publications/invasions-privacy-ip43>.

General comments in response to the Issues Paper

A privacy invasion protection mechanism would introduce privacy protections in areas that may not be covered by existing privacy legislation in Australia, consistent with Australia's international obligations in relation to privacy protection.² The OAIC supports the development of a new mechanism which protects against serious privacy invasions in a manner which meets three key challenges:

- appropriately balancing the right to privacy against other rights, including the right to freedom of expression. The OAIC believes it is critical that any new legal framework designed to redress privacy invasion recognises that the right to privacy is not absolute.³ The OAIC believes this challenge can be met by the careful design of the elements comprising a proposed mechanism⁴
- ensuring the new mechanism is accessible to all individuals who have been subject to a serious invasion of their privacy. Accessibility will help ensure that the mechanism achieves the intended benefits and meets community expectations regarding increased privacy protections. The OAIC believes the best option for protecting against serious invasions of privacy in a manner that successfully meets this challenge is to adopt an administrative complaints model, rather than a cause of action actionable only to the courts
- ensuring the mechanism is appropriately framed to provide the flexibility to apply over time in a wide range of settings to all acts and practices that are a serious invasion of privacy. Particularly, the mechanism should be technology neutral, in order to address privacy invasive acts and practices that may emerge as a result of technological developments and consequential social trends. The OAIC therefore cautions against taking a piecemeal approach to address different acts or practices, exempting specific acts or practices, and drawing distinctions between acts and practices that occur in digital and other settings.

Amending the current privacy regulatory framework to redress serious privacy invasions

Meeting the key challenge of ensuring the new mechanism is accessible

A focus of both this inquiry and previous inquiries⁵ has been a possible cause of action for serious privacy invasion actionable only to the courts.⁶ However, the OAIC is concerned that such a mechanism may pose access to justice issues for a significant portion of the

² Discussion of Australia's international obligations and areas not covered by existing privacy regulation is contained in the OAIC's response to Question 2.

³ Further discussion of balancing various rights is contained in the OAIC's response to Questions 7 and 8.

⁴ See the OAIC's response to Questions 6 to 8 for more detail.

⁵ The inquiries conducted by the Australian Law Reform Commission, NSW Law Reform Commission, Victorian Law Reform Commission and the Department of the Prime Minister and Cabinet.

⁶ For example, Item 3 in the Terms of Reference for this ALRC inquiry requires the ALRC to make recommendations regarding the detailed legal design of a statutory cause of action for serious invasions of privacy touching on at least 13 different issues. Questions 1 -25 of the Issues Paper are directed towards the legal design of a statutory cause of action.

population and not meet the key challenge of ensuring the new mechanism is accessible to all individuals who have been subject to a serious invasion of their privacy.

A related concern is that the phrase ‘cause of action’ can misleadingly amalgamate issues that should be treated separately, in particular, the principles or criteria for deciding if there has been an actionable invasion of privacy, the body that has jurisdiction to decide if a breach occurred, the remedy or relief that can be granted by that body, and the entity against which a remedy can be granted.

The OAIC therefore suggests that the central question of how to effectively redress serious privacy invasion needs to be approached from a different perspective. A different perspective is invited by the Terms of Reference for this Inquiry, including in paragraph 4, which asks the ALRC to make recommendations regarding the nature and appropriateness of any other legal remedies for redress for serious invasions of privacy. This is partly reflected in Question 27 of the Issues Paper, which asks:

In what other ways might current laws and regulatory frameworks be amended or strengthened to better prevent or redress serious invasions or privacy?

The OAIC considers that serious invasions of privacy would be best addressed by amending the existing privacy regulatory framework in the Privacy Act to extend the complaints framework in that Act to cover serious invasions of privacy (as outlined in further detail below).

Background to the complaints framework in the Privacy Act

When the Privacy Act was enacted in 1988, it primarily regulated agencies’ handling of personal information. The chosen model for redress was a right to complain and to have that complaint resolved by the Commissioner in accordance with the complaints framework in that Act. Subsequently, the Privacy Act was amended to include personal information handling provisions in relation to credit reporting, and then for the private sector. In each instance, the existing complaints framework in the Act, with some amendment, was applied to breaches of the new provisions.

The key features of the privacy complaints framework in the Privacy Act (as amended by the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* which commences on 12 March 2014) are:

- a complaint is assessed to determine whether the OAIC has jurisdiction to investigate and if so, whether the complaint should be investigated, whether enquiries should be conducted or whether it should be summarily dismissed
- if the complaint is not summarily dismissed, the complaint is investigated to enable the OAIC to decide whether to proceed to conciliation or to cease investigation and close the complaint
- if the complaint proceeds to conciliation, OAIC staff work with the parties in an attempt to conciliate the complaint to the satisfaction of both parties
- if the complaint is not resolved at conciliation, a Commissioner may either proceed to make a determination in the matter, or may decline to make a determination and the OAIC will close the complaint

- a decision by a Commissioner to make a determination can be reviewed by the Administrative Appeals Tribunal (Privacy Act s 96) and, along with other decisions in relation to complaints, under the *Administrative Decisions (Judicial Review) Act 1977* (Cth)
- following a determination, either the complainant or a Commissioner can commence proceedings in the Federal Court or Federal Circuit Court to enforce a determination. A court dealing with such an application against an organisation will conduct a hearing de novo of the question of whether the respondent organisation has engaged in conduct that constituted an interference with the privacy of the complainant
- a Commissioner may also accept an enforceable undertaking from a respondent (s 33E) or seek a civil penalty against a respondent where a civil penalty provision has been breached (s 80W).

A complaints model for privacy invasion

The OAIC recommends the adoption of a model in which the initial dispute resolution option for a person alleging an invasion of privacy is to complain to the OAIC under the complaints framework in the Privacy Act (termed the Complaints Model for Privacy Invasion).

The strength of this model of dispute resolution is that it meets the key challenge of ensuring the new mechanism is accessible to all individuals who have been subject to a serious invasion of privacy. Consistently with the emphasis in federal law on alternative dispute resolution,⁷ this model would have the benefit of encouraging fast, informal and low-cost resolution of disputes through conciliation.

A further benefit of the Complaints Model for Privacy Invasion is that it builds on the existing model of the Privacy Act. Complainants would have access to the OAIC's existing privacy expertise and processes, and expertise in privacy complaint conciliation. It would confirm the role of the Privacy Act as the comprehensive source of national law on privacy protection in Australia.

However, the OAIC emphasises that the significant benefits offered by the Complaints Model for Privacy Invasion could only be delivered if the scheme was adequately funded. Careful consideration therefore would need to be given to the level of resourcing required to successfully implement this approach.

Incorporating the Complaints Model for Privacy Invasion into the Privacy Act

Exactly how the Complaints Model for Privacy Invasion would be integrated into the Privacy Act will depend on the decision as to the appropriate grounds of complaint, investigation powers and remedies. While further consideration will be necessary if the Complaints Model for Privacy Invasion is adopted, the OAIC makes the following preliminary comments about how it could be implemented in legislation:

⁷ See the OAIC's response to Question 24 for more detail.

- the ‘privacy invasion’ provisions should be contained in a new Part added to the Privacy Act. The existing provisions of the Privacy Act are focussed on the Australian Privacy Principles⁸ that are generally concerned with information privacy. A new Part, dealing with privacy invasion, would define the criteria or grounds for complaint more broadly, capturing serious breaches of any aspect of an individual’s privacy⁹
- the Privacy Act would separately define the entities to which the privacy invasion provisions applied.¹⁰ In particular, this means the provisions would apply to individuals acting in their personal capacity
- a breach of these ‘privacy invasion’ provisions could constitute an ‘interference with the privacy of an individual’
- as a potential ‘interference with the privacy of an individual’, the OAIC could:
 - investigate any complaint about an alleged breach of the provisions and attempt to conciliate the complaint
 - conduct an own motion investigation of an act or practice that may breach the ‘privacy invasion’ provisions¹¹

using the investigative procedures and powers in Part V of the Privacy Act. Further consideration should be given as to whether any of the Part V provisions would need to be tailored for this context, although the OAIC’s preliminary view is that any required changes could be accommodated within Part V

- following an investigation (either following a complaint or on the OAIC’s own initiative), a Commissioner would have the power under s 52 to make a determination in relation to the act or practice. Other Privacy Act remedies could also be made available (such as accepting an enforceable undertaking (s 33E) or seeking a civil penalty for malicious, egregious or repeated privacy invasions (s 13G))¹²
- an act or practice could be both a breach of an existing obligation in the Privacy Act (such as an APP or a provision in Part IIIA) and a breach of the ‘privacy invasion’ provisions. The OAIC suggests that the legislation should include a mechanism that ensures an individual is not awarded relief more than once for an act or practice that breaches both existing provisions in the Privacy Act and the new privacy invasion provisions.

⁸ The Australian Privacy Principles (APPs) will be introduced by the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* which commences on 12 March 2014. The APPs are a single set of privacy principles which will replace the existing National Privacy Principles and Information Privacy Principles in the *Privacy Act 1988*.

⁹ See the OAIC’s response to Question 2 for more detail.

¹⁰ In its response to Question 15 of the Issues Paper, the OAIC submits that there should be no exemptions to a privacy invasion action (whether the Complaints Model for Privacy Invasion or a court action).

¹¹ See the OAIC’s response to Question 20 for further information.

¹² See Question 16 ‘Exemplary damages’ for additional comments in relation to a civil penalty provision.

The OAIC acknowledges that in its existing complaint handling role, the respondents are principally agencies or organisations, rather than individuals acting in their personal capacity. However, the OAIC considers that the complaints handling model is also appropriate to handling complaints against individuals in their personal capacity, as may be the case for serious privacy invasions.¹³ In both cases, the OAIC is required to determine whether the relevant elements have been made out, and ‘decline powers’ in s 41 of the Privacy Act (powers which allow it to decline to investigate complaints in certain circumstances) could be used to decline complaints, including those that do not meet the threshold requirements.

The role of the courts

Courts would still play an important role under a Complaints Model for Privacy Invasion by providing guidance in this new area of law. A complaints approach coupled with court access in limited circumstances provides the dual benefits of increasing access to justice through a free complaints process, and incorporating the existing privacy role of the courts.

The OAIC suggests two new avenues for court involvement:

- the OAIC could be authorised to refer a question of law to the court for guidance, on either the application of a party to the complaint or the OAIC's own initiative
- the OAIC could also be empowered to terminate a ‘privacy invasion’ investigation if satisfied that the subject matter of the complaint involves an issue of public importance that should be considered by the Federal Court or Federal Circuit Court (similar to the termination ground in s 46PH(h) of the *Australian Human Rights Commission Act 1986*).

The existing private right of action in s 98 of the Privacy Act could also be available. That section provides that the OAIC or any other person may apply to the Federal Court or Federal Circuit Court for an injunction to restrain a person from engaging in conduct that contravenes the Privacy Act. The existing review rights in relation to determination decisions would also be available.¹⁴

Removing exemptions to the Privacy Act

An alternative option for amending or strengthening current laws and regulatory frameworks to better prevent or redress serious privacy invasion is to extend the Privacy Act to selected bodies and activities that are currently excluded.

The Privacy Act does not cover various exempt entities (such as small businesses with a turnover of \$3 million or less) and certain acts and practices (such as journalistic and

¹³ The OAIC notes that it can currently handle some complaints against individuals acting in their personal capacity, including in relation to tax file numbers, the Personal Property Securities Register, healthcare identifiers, and certain credit reporting provisions.

¹⁴ As noted above, a decision to make a determination can be reviewed by the Administrative Appeals Tribunal (Privacy Act s 96) or under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). A determination can also be enforced in the Federal Court or Federal Circuit Court.

political acts and practices).¹⁵ Amending the current regulatory framework to remove some or all of these exemptions would provide additional protections against privacy invasion for individuals in relation to the handling of their personal information.¹⁶

While this approach would improve privacy protections to some extent, these improvements would apply only to information privacy and not to other types of privacy (such as bodily and territorial privacy).

A statutory cause of action

If the Complaints Model for Privacy Invasion is not adopted and some or all of the exemptions to the Privacy Act are not removed, the OAIC supports the enactment of a statutory cause of action actionable only to the courts.

Given the Issues Paper's primary focus on a court action, the OAIC has followed the style of the questions which are addressed to creating a cause of action. However, the OAIC notes at many points that the question can equally be posed in terms of creating a new redress mechanism or a cause of action.

The answers to questions 1-16, 19 and 21 equally apply to both a court action and the Complaints Model for Privacy Invasion. For questions 17, 18, 20 and 22-25, the OAIC has either made comments in relation to both a court action and the Complaints Model for Privacy Invasion, or the question is relevant only to a court action.

Comments in response to Issues Paper questions

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?

The OAIC generally agrees with the following guiding principles for reform identified in the Issues Paper:

- privacy as a value
- privacy as a matter of public interest
- balancing of privacy with other values and interests
- international standards in privacy law

¹⁵ See Privacy Act ss 6C(1) and 6D (small businesses), s 7B(4) (journalistic acts) and s 7C (political acts).

¹⁶ Exemptions to the Privacy Act were considered by the ALRC in its Australian Privacy Law and Practice Inquiry and addressed in Chapters 33-44 of its 2008 Report. The ALRC recommended removal of the exemptions relating to small businesses (rec 39-1), employee records (rec 40-1), registered political parties and political acts and practices (rec 41-1), and recommended the introduction of a definition of 'journalism' for the journalistic exemption (rec 42-1). These recommendations were not part of the Government's First Stage Response to the ALRC's report, and they have not subsequently been responded to by Government.

- flexibility and adaptability
- coherence and consistency
- access to justice.

However, the OAIC believes that ‘privacy as a value’ should be reframed as ‘privacy as a right’. Privacy is a human right recognised in several international instruments, including the Universal Declaration of Human Rights (Article 12) and the International Covenant on Civil and Political Rights 1966 (ICCPR) (Article 17). Given this widespread recognition and acceptance of privacy as a human right, the OAIC believes that ‘privacy as a right’ is a more appropriate guiding principle for this ALRC inquiry.

The OAIC notes that the principle of ‘balancing of privacy with other values and interests’ is particularly important. It is critical that any redress mechanism or cause of action is formulated in a way that recognises that the right to privacy is not absolute. The right to privacy must be appropriately balanced against other competing rights, including the right to freedom of expression.

The OAIC also believes that ‘access to justice’ as a guiding principle is particularly important in ensuring that any redress mechanism or cause of action is effective and meets community expectations in relation to increased privacy protections. The need for an accessible redress mechanism is a prime reason for the OAIC’s support for a Complaints Model for Privacy Invasion.¹⁷

An aspect of ‘access to justice’ is the availability of effective and enforceable remedies. As noted below, the ICCPR requires parties to ensure that effective and enforceable remedies are available for breaches of the rights recognised in that instrument. The OAIC suggests that this concept, though an element of access to justice, should be separately identified as a guiding principle for the inquiry.

Question 2 – What specific types of activities should a statutory cause of action for serious invasion of privacy prevent or redress?

While the OAIC considers that other stakeholders may be better placed to provide examples of specific types of activities that a mechanism to redress serious privacy invasion could seek to address, the OAIC makes the following general comments.

A mechanism to redress serious privacy invasion is needed because current privacy legislation does not fully implement Australia’s international obligations in relation to privacy protection.¹⁸

¹⁷ See ‘General comments’ section above.

¹⁸ It has been suggested that the Privacy Act ‘is not a full implementation in domestic law of the meaning of Article 17’ – see ALRC Report 108 [74.15]. See also [74.14] which discusses the United Nations High Commissioner for Human Rights’ General Comment 16 which states that Article 17 should protect citizens against all interferences and attacks on privacy, family, home or correspondence ‘*whether they emanate from State authorities or from natural or legal persons*’, and that ‘*state parties are under a duty themselves not to engage in interferences inconsistent with Article 17 and to provide the legislative framework prohibiting such acts by natural or legal persons*’.

Privacy is a human right recognised in several international instruments, including in Article 17 of the ICCPR, to which Australia is a party.¹⁹ Article 17 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.*

Article 2 of the ICCPR obliges parties to ensure that the necessary steps are taken to adopt laws or other measures necessary to give effect to the rights provided for in that instrument. Each party undertakes to ensure effective and enforceable remedies are available, and that claims are determined by competent judicial, administrative or legislative authorities.

The Privacy Act is a legislative measure adopted in Australia to protect privacy, and gives partial effect to Article 17. It regulates the handling of personal information by Australian, ACT and Norfolk Island government agencies. It also regulates the activities of certain private sector organisations, including health service providers and businesses with an annual turnover of more than \$3 million. The activities of State and other Territory government agencies are regulated by State or Territory legislation where it exists.

The Privacy Act, however, is not a complete legislative response to the requirements of Article 17 of the ICCPR. There are a number of areas not covered by privacy regulation in Australia. For example, the Privacy Act does not cover the actions of individuals per se,²⁰ or various exempt entities (such as small businesses)²¹ and acts or practices (such as journalistic²² and political²³ acts and practices). In addition, the Privacy Act only regulates information privacy and provides no protection for bodily and territorial privacy. However, other legislation or common law doctrines may provide limited or partial protection against privacy-invasive conduct.

The OAIC cautions against framing a new redress mechanism or cause of action by exhaustively defining the specific acts or practices that pose a privacy risk and are actionable. The speed of technological development may mean that any such mechanism will quickly date and provide narrow and inflexible coverage.

The OAIC considers that a new redress mechanism or statutory cause of action for serious privacy invasion should be framed flexibly to ensure that Article 17 is fully implemented and the complete range of serious privacy invasive conduct that arises over time in a wide range of settings is within its ambit. The OAIC also draws attention to the terms of Article 2 of the ICCPR, which envisage that claims can be determined by a judicial, administrative

¹⁹ The right to privacy is also recognised in Article 12 of the *Universal Declaration of Human Rights*.

²⁰ Individuals are covered in limited circumstances, such as where the individual is also an organisation (such as a sole trader with an annual turnover of greater than \$3 million), the individual derives a commercial benefit from handling personal information, or the individual handles tax file numbers.

²¹ See Privacy Act ss 6C(1) and 6D.

²² See Privacy Act s 7B(4).

²³ See Privacy Act s 7C.

or legislative authority. The OAIC's proposed Complaints Model for Privacy Invasion is consistent with the Article 2.

Question 3 – What specific types of activities should the ALRC ensure are not unduly restricted by a statutory cause of action for serious invasion of privacy?

The OAIC agrees that a redress mechanism or statutory cause of action for serious invasion of privacy should not unduly restrict legitimate activities or give rise to unmeritorious actions. The correct balance can be struck by ensuring that the elements of the cause of action or right to complain are defined so as to balance competing public interests, and require a reasonable expectation of privacy, and objectively offensive conduct. As explained elsewhere in this submission, it is important also to define comprehensively the defences to an action or complaint.²⁴

Question 4 – Should an Act that provides for a cause of action for serious invasion of privacy include a list of examples of invasions of privacy that may fall within the cause of action? If so, what should the list include?

Privacy regulation operates against a backdrop of significant technological change; it is therefore critical that the legislation be formulated in a way that allows a cause of action or complaint to evolve as the circumstances require. The OAIC suggests that legislation providing for a statutory cause of action for privacy invasion (or a right to complain) should include a non-exhaustive list of examples of invasions of privacy that are actionable. Such a list would achieve the dual aims of providing some guidance as to the scope of this actionable right while still allowing flexibility for it to evolve with social and technological developments.

The legislation should make clear that the list is by way of broad example only, and that the elements of the action will still need to be satisfied in order to establish an actionable invasion of privacy.

The legislation should also make clear that the cause of action (or right to complain) is intended to be available in relation to invasions of any aspect of an individual's privacy, including invasions of an individual's information, territorial and bodily privacy. The OAIC suggests this be achieved by both a statement prefacing the list, and by ensuring the list itself contains an example from each aspect of an individual's privacy.

The OAIC suggests that the list should include the following:²⁵

- there has been an interference with an individual's home or family life
- an individual has been subjected to unauthorised surveillance

²⁴ See the OAIC's responses to Questions 6 (actionability threshold), 7 to 8 (balancing competing public interests), and 12 to 14 (defences).

²⁵ The first four items in this list reflect Recommendation 74-1 in the ALRC's 2008 Report 108 *For Your Information, Privacy Law and Practice*. The OAIC suggests the final item to include a bodily privacy example for completeness.

- an individual's correspondence or private written, oral or electronic communication has been interfered with, misused or disclosed
- facts of a sensitive nature²⁶ relating to an individual's private life have been disclosed
- an individual has been subject to unauthorised bodily testing.

Question 5 – What, if any, benefit would there be in enacting separate causes of action for misuse of private information, and intrusion upon seclusion?

The OAIC supports the enactment of a single, comprehensive action (whether actionable to the courts or via complaint) rather than separate actions for misuse of private information and intrusion upon seclusion. This would be a more effective way of implementing Australia's obligations under the ICCPR in a coherent and comprehensive manner.

Further, if this single, comprehensive action is included in the Privacy Act,²⁷ this would enable the Privacy Act to encompass all aspects of an individual's privacy, including information privacy, territorial privacy and bodily privacy. It is also likely to have strong community appeal, in that an individual could turn to a single enactment – the Privacy Act – for the law and remedies relating to privacy protection.

Other points that support a single, comprehensive action include the following:

- enacting separate actions that each deal with only a specific type of privacy invasion risks leaving gaps in privacy protection
- specific and separate actions may be less able to adapt and apply flexibly to changing technologies and practices than a more general cause of action that covers all serious invasions of privacy
- separate actions risks inconsistency in privacy protections and remedies for different kinds of serious invasions of privacy, which may create inconsistencies and more fragmentation²⁸
- separate actions brings greater potential for overlap between the actions, so that an individual may have a right of action in each. It also creates uncertainty about the extent to which each action might apply.

²⁶ The OAIC suggests that this example is not limited to 'sensitive information' as defined in the Privacy Act. This will ensure the example is flexible and adaptable to a range of circumstances.

²⁷ In Question 22 the OAIC recommends that a Complaints Model for Privacy Invasion be included in the Privacy Act, but suggests further consideration of where to locate an action actionable only to the courts.

²⁸ For further discussion, see the OAIC's response to Question 26.

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?

The OAIC considers that an invasion of privacy should only be actionable where both of the following two tests are met:

- the affected individual had a reasonable expectation of privacy, and
- the act or conduct would be objectively offensive to a reasonable person.

The OAIC appreciates that the ‘reasonable expectation of privacy’ and ‘offensive’ requirements are not necessarily mutually exclusive. For example, the fact that a particular privacy invasion would be offensive to a reasonable person may also point to the existence of a reasonable expectation of privacy. However, this overlap will not always be present and it is conceivable that an invasion may occur which is not offensive to a reasonable person notwithstanding the fact the individual had a reasonable expectation of privacy.

In the OAIC's view, an objective test of offensiveness as a threshold requirement allows the cause of action (or right to complain) to become reflective of societal attitudes as they change and may serve to limit frivolous or vexatious claims. Having a threshold may also serve to allay some of the concerns raised in previous inquiries about certain matters unintentionally falling within the scope of a statutory cause of action.²⁹

Previous proposals for a statutory cause of action have characterised the offensiveness threshold as conduct that is ‘highly offensive’ to a reasonable person. However, the OAIC considers that a ‘highly offensive’ threshold is not appropriate, as it is likely to be largely unattainable, preventing meritorious cases from proceeding.

The Issues Paper refers to the possibility of the second threshold being characterised by reference to serious ‘distress’ or ‘harm’ having been caused, rather than offensiveness. The OAIC considers that a test relating to the offensiveness of conduct is preferable to a requirement that it cause distress or harm. In particular, the OAIC considers that any cause of action or right to complain should be actionable without proof of damage. A requirement that the act or conduct be likely to cause distress or harm would be inconsistent with this.³⁰

The Issues Paper also suggests the test could simply be ‘serious’, and refers to the new civil penalty provision in the Privacy Act from 12 March 2014 which will enable the OAIC to seek a civil penalty in cases of ‘serious’ or ‘repeated’ interference with privacy.³¹ The OAIC's concern is that to adopt the same term in the privacy invasion context may cause confusion. Particularly in the context of the Complaints Model for Privacy Invasion, the

²⁹ For example, ALRC Report 108 *For Your Information: Australian Privacy Law and Practice* expressed concern that street art might unintentionally fall in the scope of a statutory cause of action.

³⁰ See the OAIC's response to Question 10 of the Issues Paper below.

³¹ Section 13G of the Privacy Act as amended by the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* from 12 March 2014.

OAIC notes that not all ‘serious invasions of privacy’ would qualify as a ‘serious’ or ‘repeated’ interference with privacy for which a civil penalty may be imposed.³²

To provide more guidance as to when the threshold tests might be met, the OAIC suggests the legislation include the following list of relevant matters that must be taken into account by a court (or Commissioner under the Complaints Model for Privacy Invasion) in considering whether the two threshold tests for establishing the cause of action for invasion of privacy have been made out:

- the nature of the subject matter that it is alleged should be private
- the relationship between the individual and the alleged wrongdoer
- the extent to which the individual has a public profile
- the extent to which the individual is or was in a position of vulnerability
- whether the conduct concerned contravened a provision of a statute of an Australian jurisdiction.³³

The list should also permit other relevant but unspecified matters to be considered.

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?**

The OAIC believes it is critical that any cause of action (or right to complain) is formulated in a way that recognises that the right to privacy is not absolute. Privacy is a right that must be appropriately balanced against other rights, including the right to freedom of expression and the public interest in being informed about matters of public concern. The balancing process will therefore be an essential part of a mechanism to redress serious privacy invasion.

The OAIC supports integrating the balancing of other public interests to occur as part of the consideration of whether an individual’s privacy has been invaded. This is a conceptually preferable way of ensuring that all relevant public interests are considered before any decision is reached that there was a serious invasion of privacy. It is preferable to raising a particular public interest consideration as a defence to a finding that an invasion of privacy occurred.

An integration model means that no party to the action bears the onus of proving or disproving the existence of a particular public interest consideration. Rather, it is open to

³² See the OAIC’s response to Question 16 of the Issues Paper below.

³³ These examples were raised by the NSWLRC. The NSWLRC Report raised three additional matters which the OAIC did not agree should be included – see Question 8: <http://www.oaic.gov.au/news-and-events/submissions/privacy-submissions/issues-paper-a-commonwealth-statutory-cause-of-action-for-serious-invasion-of-privacy>.

the parties to address aspects of the public interest which they think are relevant to deciding whether an invasion of privacy occurred.

Question 8 – What guidance, if any, should the Act provide on the meaning of ‘public interest’?

The OAIC supports the Act providing some guidance on the meaning of public interest. However, the OAIC considers that the legislation should not provide a definition of public interest. Rather, this guidance should be achieved by including a non-exhaustive list of examples of relevant matters of public interest.

The OAIC considers that list could include matters such as those outlined in paragraph 24 of the Issues Paper:

- freedom of speech, including the freedom of the media
- freedom of artistic and creative expression
- the proper administration of government and matters affecting the public or members of the public
- the promotion of open justice
- national security and safety
- the prevention and detection of criminal and fraudulent activity
- the effective delivery of essential services in the community
- the protection of vulnerable persons in the community
- national economic development and participation in the global digital economy
- the capacity of individuals to engage in digital communications and electronic financial and commercial transactions.

The approach of including a non-exhaustive list of factors balances the need to provide some guidance and clarity about the possible relevant public interests, without unintentionally limiting the matters of public interest that might be relevant over time as the cause of action (or right to complain) evolves.

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?

The OAIC does not support confining the cause of action to only intentional or reckless invasions of privacy. Negligent acts should be covered also. However, the OAIC notes that in many cases, negligent acts will not meet the threshold test that the conduct be offensive.³⁴

To accommodate this, the OAIC suggests an approach where no fault element is specified. The intention or culpability of the person responsible for any invasion of

³⁴ See the OAIC’s response to Question 6.

privacy will instead be relevant to determining whether the offensiveness threshold has been met, and the appropriate remedy to be awarded to the plaintiff or complainant.

The OAIC notes that no fault element is required for complaints made to the OAIC for an interference with privacy under the Privacy Act. A finding of an interference with privacy can be made in relation to negligent and accidental acts, as well as those which are intentional or reckless.

Question 10 – Should a statutory cause of action for serious invasion of privacy require proof of damage or be actionable *per se*?

The OAIC recommends that a cause should be actionable without proof of damage. As a human right, an action for invasion of privacy should not be dependent on proving damage (even if damage were defined broadly to include humiliation and emotional distress).

This approach is consistent with the Privacy Act, under which an individual can complain about an interference with privacy without proof of damage (although damage may be relevant to an award of compensation).

Question 11 – How should damage be defined for the purpose of a statutory cause of action for serious invasion of privacy? Should the definition of damage include emotional distress (not amounting to a recognised psychiatric illness)?

While the OAIC considers that a cause should be actionable without proof of damage,³⁵ the damage suffered by an individual should be relevant to determining the appropriate remedy to be awarded.

The OAIC considers that the definition of damage should include emotional distress (not amounting to a recognised psychiatric illness), as emotional distress is a relevant harm suffered in the privacy context.

The OAIC notes that including emotional distress within the definition of damage would be consistent with the position under the Privacy Act for interferences with privacy. When making a determination under s 52, a Commissioner can declare that:

- the respondent should perform any reasonable act or course of conduct to redress any loss or damage suffered by the complainant (s 52(1)(b)(ii))
- the complainant is entitled to a specified amount by way of compensation for any loss or damage suffered (s 52(1)(b)(iii)).

The loss or damage referred to includes injury to the complainant's feelings or humiliation suffered by the complainant (s 52(1A)).³⁶

³⁵ See the OAIC's response to Question 10.

³⁶ This same definition will be moved to s 52(1AB) of the Privacy Act following 12 March 2014.

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?

The OAIC agrees with the defence of ‘conduct incidental to the exercise of a lawful right of defence of person or property’, but sees merit in adopting a qualifier so that the defence is only available where the act or conduct was a reasonable and proportionate response to the threatened harm. This qualifier may assist in defining the scope of this defence and ensuring it is not inappropriately applied.

The OAIC supports a defence being available where the act or conduct was required or authorised by or under law. However, the OAIC does not believe that a qualifier should be added to this defence. This is consistent with the Privacy Act, in which acts or practices that are ‘required or authorised by or under law’ are generally excepted from the requirements of the Act.³⁷ Further, limiting the availability of this defence is inconsistent with the terms of the authorising legislation.

Question 13 – What, if any, defences similar to those to defamation should be available for a statutory cause of action for serious invasion of privacy?

The OAIC considers that there should be a defence that the publication of the information was, under the law of defamation, privileged.

The OAIC also sees merit in adopting a defence similar to the statutory defence in defamation law of ‘innocent dissemination’. Given that the cause of action (or right to complain) might arise in respect of intentional acts or practices (as opposed to intentional privacy invasions), it may extend to situations in which a subordinate distributor intentionally publishes or distributes information which invades an individual's privacy, notwithstanding the fact the distributor could not reasonably have known that a privacy invasion would occur. The OAIC considers that a defence should be available in such circumstances.

³⁷ The Issues Paper notes previous recommendations by the ALRC in relation to the meaning of ‘law’ for the purposes of this defence. The OAIC notes that the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* will amend the *Privacy Act 1988* from 12 March 2014 to generally phrase this exception as ‘required or authorised by or under an Australian law or a court/tribunal order’, and to include the following definition of ‘Australian law’ in s 6:

- (a) an Act of the Commonwealth or of a State or Territory; or
- (b) regulations, or any other instrument, made under such an Act; or
- (c) a Norfolk Island enactment; or
- (d) a role of common law or equity.

This definition is intended to exclude contracts (see Explanatory Memorandum, Schedule 1, item 8). ‘Court/tribunal order’ is also defined in s 6 as an order, direction or other instrument (including of an interim nature) made by a court, tribunal, judge or acting judge, magistrate or acting magistrate, or member or officer of a tribunal.

Question 14 – What, if any, other defences should there be to a statutory cause of action for serious invasion of privacy?

The OAIC suggests that the list of defences contained in legislation should be exhaustive. The OAIC considers that many of the defences outlined in paragraph 73 of the Issues Paper will be unnecessary if other proposals in the OAIC's submission are taken up: a balancing of different public interests is required; the two threshold tests are reasonable expectation of privacy and offensiveness of the conduct; and defences are available of required or authorised by law, lawful right of defence of person or property and the defamation defences.³⁸

For example:

- the fact that the information was already in the public domain would be highly relevant to determining whether the plaintiff had a reasonable expectation of privacy, and whether the publication of the information was offensive to a reasonable person
- in relation to other remedies in respect of an invasion of privacy being available, the OAIC considers that this fact should not limit the right of an individual to bring an action. The individual should be free to choose the basis on which they put their case and the remedy they seek. Further, it may not always be a straightforward matter to determine whether there is another remedy available. As the Issues Paper notes at paragraph 162, there are significant uncertainties in the protection that existing legislation and common law actions provide for serious invasions of privacy.

However, the OAIC sees merit in giving further consideration to a defence in some circumstances that, for online material, the material has been taken down upon notification. In particular, the defence should only be available to an internet service provider or content host that unknowingly hosts the published material. A cause of action (or right to complain) should still remain against the individual or entity that submitted the material for online publication.

Further, careful consideration should be given to the design of this defence, so that the notification process is not overly onerous and that the material is taken down as quickly as possible.

Question 15 – What, if any, activities or types of activities should be exempt from a statutory cause of action for serious invasion of privacy?

The OAIC considers that there should be no exemptions to the statutory cause of action. The elements of the cause of action (balancing competing public interests, reasonable expectation of privacy, and offensiveness of the conduct) together with an exhaustive list

³⁸ See the OAIC's responses to Questions 6 (actionability threshold), 7 to 8 (balancing competing public interests), and 12 to 13 (defences).

of defences³⁹ provide adequate protection from unmeritorious actions for individuals and entities engaged in legitimate activities.

The OAIC notes that given the exemptions that currently exist in the Privacy Act, a situation is likely to emerge if a cause of action (or right to complain) is adopted where certain entities, acts or practices are actionable under the cause of action (or right to complain) and not under the current privacy interference complaints regime in the Privacy Act. The OAIC does not foresee any difficulties with this dichotomy, even if the Complaints Model for Privacy Invasion is adopted, resulting in complaints to the OAIC under both regimes.

However, if the new cause of action (or right to complain) is included within the Privacy Act, the legislation will need to make clear that the existing Privacy Act exemption do not apply to the cause of action.⁴⁰

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 calculation of a notional licence fee**
- **an account of profits?**

The OAIC considers that the Act should provide for a broad range of remedies and that a court or Commissioner should be able to apply a remedy that is most appropriate to the circumstances of the case. Under a Complaints Model for Privacy Invasion there may be a need for slight differences in the available remedy options.

Maximum award of damages

On balance, the OAIC considers that no maximum award of damages, including for non-economic loss, be prescribed in the legislation.

Prescribing a limit may have the effect of focusing attention on that upper limit and implying that serious privacy invasions should result in a payout of that magnitude. Further, the OAIC notes that the OAIC's power under s 52 of the Privacy Act to declare in a determination the amount of compensation to which a complainant is entitled is not capped. Further, damages awards are not capped under human rights law.

This is in contrast to the position under defamation law where damages for non-economic loss are capped.⁴¹ While not supporting a cap in the context of an invasion of

³⁹ See the OAIC's responses to Questions 6 (actionability threshold), 7 to 8 (balancing competing public interests), and 12 to 14 (defences).

⁴⁰ See the 'General comments' above for discussion of how the Complaints Model for Privacy Invasion could be incorporated into the Privacy Act.

privacy, the OAIC considers that it would be appropriate for a court or Commissioner to be guided by the award of damages in defamation actions, and considers that an amount greater than the cap on damages for defamation actions would be awarded only in extraordinary circumstances.

Exemplary damages

The OAIC considers that the object of the award of damages should be to compensate the plaintiff or complainant. For this reason, the OAIC does not consider that it is appropriate for exemplary damages to be awarded in a serious privacy invasion action. This is consistent with the position under s 52 of the Privacy Act, where the OAIC may award damages (including aggravated damages),⁴² but not exemplary damages.⁴³

The OAIC notes that from 12 March 2014, the OAIC will be able to seek a civil penalty under section 13G where there is a 'serious' or 'repeated' interference with privacy.⁴⁴ Under a Complaints Model for Privacy Invasion, the OAIC considers that it would be appropriate for the Act to include a civil penalty provision for situations where there is a malicious, egregious or repeated invasion of privacy. However, the OAIC suggests that this civil penalty provision should be in a separate section to s 13G to avoid confusion arising from the use of the word 'serious', and to make clear that not all 'serious invasions of privacy' would breach the civil penalty provision.

Assessment of damages based on a calculation of a notional licence fee

The OAIC considers that it is unnecessary to provide for an award of damages that are assessed on a calculation of a notional licence fee.

While it may be a relevant factor in considering the calculation of damages in a particular case, the OAIC considers it preferable that the discretion as to how to best calculate the amount of damages be left to the court in each particular case.

An account of profits

The OAIC considers that an account of profits should be available. The OAIC is aware of concerns raised by other stakeholders that an account of profits could be unworkable. However, this would only be awarded in circumstances where an account of profits could be determined.⁴⁵

⁴¹ The Uniform Defamation Law (e.g. *Defamation Act 2005* (NSW) s 35) limits damages for non-economic loss to \$250,000 (as indexed) unless a Court is satisfied that aggravated damages are also payable.

⁴² *Rummery and the Federal Privacy Commissioner & Anor* [2004] AATA 1221, [32].

⁴³ *'D' v Wentworthville Leagues Club* [2011] AICmr 9 (9 December 2011), [50]; *Hall v A & A Sheiban Pty Ltd* [1989] FCA 72, [74] per Lockhart J.

⁴⁴ Section 13G of the Privacy Act, to be inserted by the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* from 12 March 2014.

⁴⁵ See paragraph 74.178 of the ALRC Report 108.

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)?

It is critical that any cause of action (or right to complain) is formulated in a way that recognises that the right to privacy is not absolute and that it must be balanced against competing rights including the right to freedom of speech.

However, the OAIC does not consider that it is necessary for the Act to include a specific provision as to matters a court must consider when determining whether to grant an interlocutory injunction to protect an individual from a serious invasion of privacy.

The OAIC has recommended that the balancing of privacy against other public interests, which would include the public interest in freedom of expression, be included as an element of the cause of action.⁴⁶ For this reason, public interests will be highly relevant to the court's consideration of whether there is a serious question to be tried as to the plaintiff's entitlement to relief, and a further provision is not needed.

The OAIC notes that, under s 98 of the Privacy Act, a court can grant an injunction restraining conduct which may contravene the Privacy Act. While acknowledging that exemptions to the Privacy Act limit the scope of s 98 (particularly the exemption for journalistic acts and practices⁴⁷ and individuals acting in a personal capacity), the OAIC notes that s 98 contains no specific matters which the court must take into account.

Question 18 – Other than monetary remedies and injunctions, what remedies should be available for serious invasion of privacy under a statutory cause of action?

Statutory cause of action

The OAIC considers that there should be a broad range of remedies available. A court should be able to award a remedy that is most appropriate to the circumstances of the case, without being limited by jurisdictional restraints that may apply under the general law.

In addition to the remedies addressed under Questions 16 and 17 above, the OAIC considers that the following remedies should be available:

- an order requiring the respondent to apologise to the claimant
- a correction order
- an order for the delivery up and destruction of material

⁴⁶ See the OAIC's response to Questions 7 and 8 above.

⁴⁷ See Privacy Act s 7B(4).

- a declaration
- an order that the defendant rectify its business or information technology practices. Such a remedy could be used in the case of systemic problems with an entity's business processes or information technology systems.⁴⁸ While privacy regulatory regimes play a role in redressing and monitoring systemic issues, the availability of this remedy during court proceedings would usefully supplement the work of privacy regulators. The OAIC notes such a remedy would be similar to the OAIC's new power in own-initiative investigation determinations to make a declaration that an entity must take specific steps within a specific period to ensure that an act or practice is not repeated or continued⁴⁹
- ancillary orders, such as property preservation orders and search orders. This could be achieved by expressly articulating this relief, or by including a general 'such other relief as the Court considers necessary in the circumstances' provision.

The OAIC suggests that consideration should also be given to allowing a court to make orders that apply to a class of affected individuals, even where those individuals are not a party to proceedings (for example, a provision similar to s 12GNB of the *Australian Securities and Investments Commission Act 2001* (Cth) could be included). The option to make orders of this nature would be useful in matters involving an act or practice which impacted upon the privacy of a large number of individuals.

Complaints Model for Privacy Invasion

If the Complaints Model for Privacy Invasion is adopted, the OAIC should have a similarly broad range of available remedies (noting that there may be slight differences in the available remedy options). As outlined in the 'General comments' above, the OAIC suggests that the remedies should mirror the remedies available under the Privacy Act from 12 March 2014. This would include the power to:

- make a determination following an investigation which may contain any order the Commissioner considers necessary or appropriate,⁵⁰ including declarations relating to:
 - the existence of an interference with privacy,
 - steps the respondent must take to ensure the conduct does not recur
 - steps the respondent must take to redress loss or damage suffered by the complainant

⁴⁸ See the Issues Paper [100].

⁴⁹ The OAIC's new power to make a determination following an own-initiative investigation will be contained in s 52(1A) of the *Privacy Act 1988* from 12 March 2014 (with the particular remedy contained in subsection (b)). The power to make a similar declaration following a complaint determination will be contained in s 52(1)(b)(ia).

⁵⁰ Section 52(3A) of the Privacy Act, as amended by the *Privacy Amendment (Enhancing Privacy Protection) Act 2012*.

- a specified amount of compensation payable (this allows the OAIC to in effect award damages and aggravated damages)⁵¹
- enforce that determination⁵²
- accept and enforce an enforceable undertaking⁵³
- seek an injunction⁵⁴
- seek a civil penalty for certain serious invasions of privacy.⁵⁵

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?

The protections in the Privacy Act only apply to living persons. In relation to deceased individuals, the OAIC's view is that:

- a complaint cannot be brought under the Privacy Act in relation to the handling of an individual's personal information following the death of that individual
- however, where a complaint was lodged prior to the individual's death, the OAIC can continue to deal with the complaint.

To ensure consistency with this position, the OAIC considers that the statutory cause of action (or right to complain) should be restricted to living persons, or privacy invasion actions commenced prior to an individual's death.

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?

The OAIC does not support the OAIC being able to bring an action in respect of the serious invasion of privacy of an individual or individuals. In its existing role in investigating alleged interferences with privacy, the OAIC's role is that of an impartial investigator. The OAIC is concerned that a power to bring court actions on behalf of individuals before the allegations have been investigated or heard could be perceived as compromising the OAIC's impartiality.

⁵¹ Sections 52(1) and 52(1A) of the Privacy Act, as amended by the *Privacy Amendment (Enhancing Privacy Protection) Act 2012*.

⁵² Sections 55A and 62 of the Privacy Act, as amended by the *Privacy Amendment (Enhancing Privacy Protection) Act 2012*.

⁵³ Section 33C of the Privacy Act, as amended by the *Privacy Amendment (Enhancing Privacy Protection) Act 2012*.

⁵⁴ Section 98 of the Privacy Act.

⁵⁵ Sections 13G and 80W of the Privacy Act, as amended by the *Privacy Amendment (Enhancing Privacy Protection) Act 2012*. See the OAIC's comments under 'Exemplary damages' in Question 16 for further discussion of this option.

However, given the OAIC's current role in privacy regulation and complaints, the OAIC sees merit in legislating to permit the OAIC to have the option of the following roles in proceedings:

- a right to intervene in proceedings (or alternatively to seek the leave of the court to intervene)
- a right to seek the leave of the court to act in the role of *amicus curiae* in the proceedings.

In relation to an intervener role, the OAIC favours permitting intervention as of right. The OAIC notes, as an example, that the President of the Anti-Discrimination Board of NSW has the right to intervene in proceedings of the NSW Industrial Relations Commission if the President establishes that the proceedings concern unlawful discrimination under the *Anti-Discrimination Act 1977* (NSW).⁵⁶ Alternatively, legislation gives the Australian Human Rights Commission the function of intervening in court matters involving human rights issues with the leave of the court and subject to any conditions imposed by the court.⁵⁷

In relation to an *amicus curiae* role, the OAIC notes that legislation grants this role to the various Commissioners of the Australian Human Rights Commission in specified circumstances.⁵⁸ These circumstances include proceedings where the orders sought may affect to a significant extent the human rights of non-parties, proceedings that may have significant implications for the administration of the relevant Act, and proceedings where it is in the public interest for the Commissioner to assist the court. The OAIC considers that it may be appropriate for an *amicus curiae* function to be available to an OAIC Commissioner in analogous circumstances.

To ensure a Commissioner can consider exercising these intervener and *amicus curiae* powers in a timely manner, provision would also need to be made for the OAIC to be notified when serious privacy invasion proceedings are commenced.

The OAIC notes that the OAIC is currently able to investigate a possible interference with privacy under the Privacy Act on its own initiative (s 40(2) of the Privacy Act). From 12 March 2014, a Commissioner will be able to make a determination under s 52(1A) following such an investigation. That determination may include various declarations, including that the act or practice is an interference with the privacy of one or more individuals and that one or more individuals are entitled to compensation. If the Complaints Model for Privacy Invasion is adopted, the OAIC suggests that a similar own-initiative investigation power in relation to serious privacy invasion, including the power to make a determination following such an investigation, be given to the Commissioners.⁵⁹

⁵⁶ See *Industrial Relations Act 1996* (NSW) s 167.

⁵⁷ See *Australian Human Rights Commission Act 1986* (Cth) s 11(1)(o).

⁵⁸ See *Australian Human Rights Commission Act 1986* (Cth) s 46PV.

⁵⁹ See 'General comments' section above.

Question 21 – What limitation period should apply to a statutory cause of action for a serious invasion of privacy? When should the limitation period start?

The OAIC sees merit in adopting an approach where an action or complaint must be commenced within 12 months from the date the applicant became aware of the relevant act or conduct, with a discretion allowing an action to be brought outside the 12 month period.

This approach is consistent with the approach that exists in relation to privacy interference complaints. Under the Privacy Act, a complaint of privacy interference can be made within 12 months from the date the applicant became aware of the relevant act or conduct. The OAIC then has a discretion as to whether or not to investigate a complaint of privacy interference made after this date.⁶⁰

The OAIC prefers the approach of calculating the time period from the date the applicant became aware of conduct, as opposed to the date that the relevant act or practice occurred. Advances in technology in the digital era (such as advances in surveillance technology and the expansion of the internet) mean that individuals may not be aware that their privacy has been invaded for some time after the conduct occurred. There is also increased potential for the impact of the privacy invasion to be continuing where the invasion involves online publication. The OAIC is of the view that such individuals should not be prevented from commencing an action for invasion of privacy (or making a complaint).

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?

A major concern in relation to privacy laws at a State and Territory level is the interaction of these laws with Commonwealth legislation and whether inconsistency and fragmentation in coverage will arise.

The OAIC therefore considers that any cause of action (or right to complain) should be introduced in a manner that:

- does not contribute to inconsistent and fragmented privacy regulation in Australia, and
- does not provide a situation where plaintiffs can forum-shop.

Subject to any constitutional restraints, the OAIC considers that consistent development of the law would be best achieved by introducing any statutory cause of action (or right to complain) into Commonwealth law.

⁶⁰ Privacy Act s 41(1)(c). This subsection will remain unchanged once amendments to the Privacy Act commence.

If, rather than inclusion in Commonwealth legislation, uniform legislation is adopted by the States, there is a risk of fragmentation arising from the adoption in some States of variations to the legislation. A further risk is the emergence of differing judicial interpretations of the legislation in each jurisdiction.⁶¹

The OAIC's support for a Complaints Model for Privacy Invasion is premised in part on the opportunity that presents to include the new provisions in the Privacy Act.⁶² As noted under Question 5, this would deal with privacy protection more comprehensively in a single statute, and would be more accessible to the community.

If a new cause of action is actionable only in the courts, further consideration should be given as to whether the provisions are included in either the Privacy Act or in separate Commonwealth legislation. On the one hand, there is benefit in having all federal privacy regulation within the same piece of legislation. On the other hand, the Privacy Act largely pertains to the OAIC's functions, so provisions unrelated to the OAIC may be better placed in other legislation.

Question 23 – Which forums would be appropriate to hear a statutory cause of action for serious invasion of privacy?

If a cause of action that is actionable only in a court is established, the Federal Court and Federal Circuit Court should be granted jurisdiction to hear and determine matters arising under the provisions. Consideration could also be given to extending that jurisdiction to Commonwealth administrative review tribunals, which would offer benefits in terms of access to justice.⁶³ The OAIC notes that the Federal Court and Federal Circuit Court are the courts with jurisdiction to hear matters under the current Privacy Act.

If a Complaints Model for Privacy Invasion is adopted, the OAIC supports the Administrative Appeals Tribunal, Federal Court and Federal Circuit Court being granted jurisdiction to hear and decide any matters that progress to the tribunal or courts from an initial complaint investigation.

The OAIC notes that if, rather than inclusion in Commonwealth legislation, uniform legislation is adopted by the States, it may be necessary for any cause of action brought under that legislation to be actionable to local, district or supreme courts in the relevant State or Territory. As mentioned under Question 22 above, one of the risks with this approach is the emergence of differing judicial interpretations of the legislation in each jurisdiction.

⁶¹ See response to Question 23 of the Issues Paper below.

⁶² See 'Overall comments' above for preliminary comments on how this model might be incorporated into the Privacy Act.

⁶³ As noted in paragraph 125 of the Issues Paper.

Question 24 – What provision, if any, should be made for voluntary or mandatory alternative dispute resolution of complaints about serious invasion of privacy?

The OAIC supports the inclusion of mechanisms which encourage the early resolution of disputes. As the Issues Paper notes, alternative dispute resolution can provide a faster, cheaper and low-risk alternative to court proceedings.⁶⁴ Including such a mechanism is consistent with the emphasis in federal law on alternative dispute resolution (see below).

Complaint conciliation

As outlined in this submission, the OAIC's preferred approach is for the adoption of a Complaints Model for Privacy Invasion, under which a person alleging an invasion of privacy may complain initially to the OAIC.

This model provides alternative dispute resolution in an administrative context by utilising the OAIC's existing processes and expertise in conciliating privacy complaints. The OAIC's primary manner of resolving current complaints of privacy interference under the Privacy Act is through conciliation. Given this approach, OAIC staff are highly skilled and experienced in conducting this form of alternative dispute resolution. The OAIC's experience and expertise in dealing with privacy disputes is a key benefit of a Complaints Model for Privacy Invasion.

It would not be appropriate for the OAIC to take on an alternative dispute resolution role in the absence of a complaints model being adopted. For example, the OAIC suggests it would not be workable for a court to refer matters to the OAIC for conciliation. In particular, this is because the OAIC relies to some extent on the investigative powers in Part V of the Privacy Act in order to successfully conduct its conciliations, and those investigative powers would not be triggered in such circumstances.

The Issues Paper refers to a disadvantage of alternative dispute resolution being that there is a public interest in having certain cases heard in court.⁶⁵ The Complaints Model for Privacy Invasion addresses this concern by providing the OAIC with the power to terminate a complaint where satisfied that the matter involves a matter of public importance that should be considered by the federal courts.⁶⁶

Alternative dispute resolution during court proceedings

If the Complaints Model for Privacy Invasion is not adopted and an action actionable only to the courts is enacted, the OAIC sees merit in providing for alternative dispute resolution in some other way. If the federal courts are granted jurisdiction to hear claims,⁶⁷ the OAIC notes that the *Civil Dispute Resolution Act 2011* (Cth) (CDRA) applies to most proceedings commenced in those courts, and requires parties to file a statement setting out the steps they have taken to attempt to resolve a dispute prior to litigation.

⁶⁴ See Issues Paper, paragraph 126.

⁶⁵ See Issues Paper, paragraph 129.

⁶⁶ See 'General comments – The role of the courts' above for more information.

⁶⁷ As recommended by the OAIC in its response to Question 23.

Legislation also empowers courts to refer matters to alternative dispute resolution, including mediation and arbitration.⁶⁸

Offer of amends

Previous inquiries considering a statutory cause of action for serious privacy invasion have raised the possibility of incorporating an ‘offer of amends’ process akin to that included in defamation law. The OAIC supports in principle the inclusion of an offer of amends process. Such a process is consistent with the policy intent behind the CDRA.

However, the OAIC considers that the offer of amends model that exists in the defamation context⁶⁹ may need to be adapted in order to function properly in the privacy context. For example, consideration would need to be given as to how an offer of amends process would work with the requirements of the CDRA (in the case of federal court actions), and how the offer requirements can be applied in the privacy context.

While an offer of amends process would generally be unnecessary in the Complaints Model for Privacy Invasion (given the role of conciliation in the complaints process),⁷⁰ it may still be useful to ensure an offer of amends process is available in those cases that do proceed to court, given that parties’ circumstances can change in the interim period.

Question 25 – Should a person who has received a determination in response to a complaint relating to an invasion of privacy under existing legislation be permitted to bring or continue a claim based on the statutory cause of action?

Legislation creating a statutory cause of action for privacy invasion is likely to overlap to some degree with the existing privacy interference complaints regime in the Privacy Act. This may mean that some privacy breaches could be pursued under either a new statutory cause of action or the existing privacy protections in the Privacy Act.⁷¹

If that choice exists, the OAIC considers that an individual should be free to choose the basis on which they bring their complaint, and the remedy they seek. However, having made that choice and obtained relief, the individual should not be permitted to seek relief for the same act or practice under another privacy law. Similarly, a person should not be permitted simultaneously to pursue both court action for privacy and a privacy

⁶⁸ See for example *Federal Court of Australia Act 1976* (Cth) s 53A.

⁶⁹ The Uniform Defamation Law (e.g. *Defamation Act 2005* (NSW) ss 12-19) deals with ‘offers to make amends’. An offer to make amends must offer to publish a reasonable correction, must offer to take reasonable steps to inform people to whom the material has been distributed that it is or may be defamatory and must include an offer to pay reasonable expenses incurred by the plaintiff before the offer and in considering the offer. The offer may make any other offer, including to pay compensation or publish an apology. A defence to the defamation action arises where the plaintiff does not accept an offer which meets a number of requirements including that it is ‘reasonable in the circumstances’.

⁷⁰ See section 40A of the Privacy Act, as amended by the *Privacy Amendment (Enhancing Privacy Protections) Act 2012* (Cth).

⁷¹ This response relates only to a cause of action actionable only to the courts. The OAIC has already commented on interaction issues in the Complaints Model for Privacy Invasion under ‘General comments – Incorporating the Complaint Model for Privacy invasion into the Privacy Act’ above.

interference complaint, and a mechanism facilitating an election or stay of one action may be required.

In particular, the individual should not be permitted to bring or continue a court claim for privacy invasion arising out of a particular act or practice where relief has already been granted following a privacy interference complaint under the Privacy Act. In this context, 'relief' includes the parties having successfully conciliated the matter, in addition to more traditional relief such as the OAIC making a determination in the complainant's favour. If the individual is not satisfied with the relief obtained through a determination in their favour, the appropriate course is for the individual to seek review of the determination,⁷² rather than by commencing court proceedings under different privacy provisions.

However, where the individual's complaint was declined by the OAIC, or a determination was made that there was no interference with privacy, the individual should have the opportunity to bring a court action in relation to a serious invasion of privacy. It may be the case that the act or practice was a serious invasion of privacy, where it was not an interference with privacy under the Privacy Act, for example, due to the operation of an exemption under the Privacy Act.

Question 26 – If a stand-alone statutory cause of action for serious invasion of privacy is not enacted, should existing law be supplemented by legislation:

- **providing for a cause of action for harassment;**
- **enabling courts to award compensation for mental or emotional distress in actions for breach of confidence;**
- **providing for a cause of action for intrusion into the personal activities or private affairs of an individual?**

The OAIC recognises there are gaps in current laws which make it difficult for an individual to redress serious invasions of their privacy in many circumstances. For example:

- as the Privacy Act does not cover the acts and practices of an individual acting in their personal capacity, it does not protect an individual against a breach of their information privacy by another individual
- the Privacy Act does not cover various exempt entities (such as small businesses with a turnover of \$3 million or less) and certain acts or practices (such as journalistic and political acts and practices)⁷³
- the Privacy Act, criminal laws, equitable actions for breach of confidence, and anti-surveillance laws do not generally protect bodily or territorial privacy⁷⁴

⁷² From 12 March 2014, s 96(1)(c) of the Privacy Act will allow parties to seek review from the Administrative Appeals Tribunal (AAT) of determinations made under s 52 of the Privacy Act. Currently, limited AAT appeal rights exist in s 61.

⁷³ See Privacy Act ss 6C(1) and 6D (small businesses), s 7B(4) (journalistic acts) and s 7C (political acts).

- where a serious privacy invasion is committed by another individual, an aggrieved individual may not be able to access existing criminal laws, equitable actions for breach of confidence, and anti-surveillance laws that on paper appear to provide some level of privacy protection (see further below).

To address these gaps, the OAIC's preference is for a flexible and accessible Complaints Model for Privacy Invasion (or alternatively, a statutory cause of action) for serious invasions of privacy (as proposed in the OAIC's 'General comments' and responses to Questions 1-25 of this Issues Paper). The OAIC considers that an appropriately constructed Complaints Model for Privacy Invasion (or cause of action) could effectively protect against a serious invasion of all aspects of an individual's privacy, including bodily and territorial privacy.

However, in the absence of the Complaints Model for Privacy Invasion, removal of some or all of the exemptions from the Privacy Act, or a statutory cause of action, the OAIC cautions against supplementing existing laws by taking a piecemeal approach to fill in the gaps. The resulting legislation may be narrow and specific, and given the speed of technological development and consequential social trends, it may quickly date and new gaps may emerge. A piecemeal approach would also risk creating an inconsistent and fragmented approach to privacy regulation in Australia which may encourage individuals to forum shop.

Consideration could instead be given to how existing mechanisms can be used to protect individuals against serious invasions of their privacy. The OAIC notes the following existing mechanisms which may already provide individuals with some protection in the categories the ALRC has raised in Question 26 of the Issues Paper.

(a) Providing individuals with protection from harassment:

- (i) various State and Federal anti-discrimination laws,⁷⁴ and State and Territory criminal laws prohibiting specific behaviour such as stalking and intimidation (referenced particularly on pages 44 and 45 of the Issues Paper)
- (ii) s 474.17 of the *Criminal Code Act 1995* (Cth) (Criminal Code), which makes it an offence for person to use a carriage service in a way (whether by the use or content of a communication, or both) that a reasonable person would consider menacing, harassing or offensive (carriage services include for example telephone and internet services) (carrying a penalty of 3 years imprisonment). This has the potential to protect an individual against harassment from another in digital settings, such as via internet connected devices or mobile phones (including calls and SMS). The OAIC interprets this provision as wide enough to capture acts of harassment that occur on social media.

⁷⁴ See Question 9 of the OAIC's previous submission to the Department of the Prime Minister and Cabinet's (November 2011) *Issues Paper - A Commonwealth statutory cause of action for serious invasion of privacy* at <http://www.oaic.gov.au/news-and-events/submissions/privacy-submissions/issues-paper-a-commonwealth-statutory-cause-of-action-for-serious-invasion-of-privacy>.

⁷⁵ For example, the *Sex Discrimination Act 1984* (Cth).

- (iii) s 471.12 of the Criminal Code, which makes it an offence for a person to use a postal or similar service in a way (whether by the use or content of a communication, or both) that a reasonable person would consider menacing, harassing or offensive (carrying a penalty of 2 years imprisonment).
- (b) Enabling courts to award compensation for mental or emotional distress in actions for breach of confidence, as in *Giller v Procopets* (2008) 24 VR 1, referenced on page 47 of the Issues Paper. *Giller* provides a precedent for courts in Australia to award compensation for mental or emotional distress in actions for breach of the equitable duty of confidence (which in some cases, may also be a serious invasion of privacy).
- (c) Providing for a cause of action for intrusion into the personal activities or private affairs of an individual, the Privacy Act, various State and Federal criminal laws⁷⁶ and anti-surveillance laws,⁷⁷ which may be used to protect individuals from intrusion into their personal activities or private affairs. However, the OAIC notes that regulating invasions of privacy by individuals under State and Federal criminal laws may not be appropriate in some cases, particularly with respect to young people.⁷⁸

To the extent that such mechanisms are not being utilised to protect individuals against serious privacy invasions, the OAIC supports further consideration being given to whether and how they may be used (see further at Question 27 below).

Question 27 – In what other ways might current laws and regulatory frameworks be amended or strengthened to better prevent or redress serious invasions of privacy?

As discussed under the ‘General comments’ in this submission, the OAIC’s view is that effective protection against serious invasions of privacy would be best achieved by amending the existing privacy regulatory framework to create the Complaints Model for Privacy Invasion. An alternative way to amend the current framework to better redress privacy invasion is to remove the existing exemptions to the Privacy Act, although the improvements delivered by this approach would be limited to information privacy.

In the absence of a Complaints Model for Privacy Invasion, removal of some or all of the exemptions from the Privacy Act or a statutory cause of action, the OAIC believes that work may need to be done to identify whether and how other existing mechanisms (outlined in the OAIC’s response to Question 26 above) may be used to address serious invasions of privacy.

In this regard, efficient and practical ways to strengthen the effectiveness of current laws and frameworks, in preventing or redressing serious invasions of privacy may include:

- clarifying and increasing understanding about their application and utility

⁷⁶ As referenced particularly on pages 44 and 45 of the Issues Paper.

⁷⁷ As referenced particularly on page 44 of the Issues Paper.

⁷⁸ For example, consensual ‘sexting’ between minors may result in a conviction under criminal law, such as placement on a sex offender register that does not distinguish between a calculating adult and foolish 16 year old), can have serious long term professional and personal impacts. See *Private faces in public spaces: privacy and the Victorian sexting inquiry* (2013) 10(2) PRIVLB 18.

- increasing awareness about their availability
- making those laws and frameworks sufficiently accessible to individuals (including through consideration of costs and alternative courses for redress).

The OAIC also notes the enhanced powers of the OAIC from 12 March 2014, including the ability to make a binding determination in an own motion investigation, and to seek civil penalties for serious and repeated interferences with privacy.⁷⁹ The OAIC believes that these amendments will assist to prevent invasions of information privacy by agencies and organisations.

Question 28 – In what other innovative ways may the law prevent serious invasions of privacy in the digital era?

There are a number of challenges to privacy protection posed by the digital era, including:

- the ease with which private individuals and entities can publish, disseminate, and duplicate information online: this allows an individual or entity to impede on the privacy of others in ways not possible before the digital era
- the permanency of material published on the internet: an instantaneous archive of images and comments are created and cached each time they are uploaded. This makes them accessible via basic internet searches and potentially available for an indefinite amount of time
- the speed of technological development: for example the expression ‘you can’t regulate the internet’, a common expression among technology writers, stems from a ‘legal lag’ which occurs due to constant development of the internet.

The OAIC considers that a Complaints Model for Privacy Invasion (or alternatively, a statutory cause of action) can assist to overcome these challenges and protect individuals against serious invasions of their privacy.

As discussed in response to Question 27 above, in the absence of the Complaints Model for Privacy Invasion, removal of some or all of the exemptions from the Privacy Act or a statutory cause of action, the OAIC believes that work may need to be done to identify whether and how existing mechanisms may be used to address serious invasions of privacy, including in digital settings. This includes work at a practical level to increase understanding about the legal mechanisms that may be available to individuals to address digital privacy invasions. For example, are individuals calling the police or other regulators when their privacy is invaded in a digital setting? Are police and regulators willing to prosecute such acts or practices using existing laws and mechanisms?⁸⁰ If not, why not? What additional powers would be useful to assist police and regulators prosecute those acts or practices?

⁷⁹ See the OAIC’s law reform page for more information: <http://www.oaic.gov.au/privacy/privacy-act/privacy-law-reform>.

⁸⁰ We note that there does appear to have been an increased reliance on s 474.17 of the Criminal Code (see response to question 26 above), in matters of online harassment and other offensive behaviour in digital settings. See for example: *Javier Rodriguez v DPP (Cth)* [2013] VSCA 216; *R v Daniel McDonald* [2013] ACTSC 122; *R v Hampson* [2011] QCA 132.

Finally, while acknowledging the particular challenges posed by the digital era, the OAIC cautions against drawing too great a distinction between acts and practices that occur in digital settings and physical settings. In particular, any additional mechanisms to prevent serious invasions of privacy should be technology and forum neutral, so as not to create a fragmented privacy regulatory framework. As online interactions are increasingly deeply integrated into modern Australian society, and privacy invasive acts or practices increasingly travel between digital and non-digital forums, the OAIC recommends that the mechanism is formulated flexibly and is adaptable to a broad range of circumstances, including both physical and digital.