Matching Rights with Remedies: a statutory cause of action for invasion of privacy

Submission to the NSW Law Reform Commission on Consultation Paper 1- Invasion of Privacy

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1. Introduction

1.1 The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) seeks to promote a just and democratic society by making strategic interventions on public interest issues.

PIAC is an independent, non-profit law and policy organisation that identifies public interest issues and works co-operatively with other organisations to advocate for individuals and groups affected.

In making strategic interventions on public interest issues PIAC seeks to:

- expose unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate;
- promote the development of law—both statutory and common—that reflects the public interest; and
- develop community organisations to pursue the interests of the communities they represent.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only, broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Centre Funding Program. PIAC also receives funding from the NSW Government Department of Energy, Utilities and Sustainability for its work on utilities, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates approximately income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

1.2 PIAC's Interest in Privacy Matters and Expertise in Privacy Law

PIAC has had a long history of interest in, and concern about, the appropriate protection of privacy rights within both the public and private sectors. PIAC's work as a consumer advocacy organisation, particularly in relation to health matters, has required PIAC to consider privacy issues because they are frequently a matter of concern to many people who contact the Centre.

In recent years PIAC has provided legal advice and assistance to clients in a number of matters involving alleged breaches of the *Privacy and Personal Information Protection Act 1998* (NSW) (**the PPIP Act**) by public sector authorities. Recently, PIAC represented the respondent in *Director General, NSW Department of Education and Training v MT* [2006] NSWCA 270, a landmark case concerning the interpretation of several key provisions of the PPIP Act.

PIAC has also provided legal advice and representation in matters involving alleged breaches of the *Privacy Act 1988* (Cth) (**the Privacy Act**). In one complaint under the Privacy Act, currently before the Office of the Privacy Commissioner, PIAC is representing a former Villawood detainee whose personal information was allegedly inappropriately disclosed to the media.

PIAC has played a leading role in privacy debates in Australia in recent years, contributing to a number of inquiries and reviews at the national and state level. Recent submissions by PIAC have addressed the privacy implications of the proposed Health and Social Services Access Card[1] and the proposal by the Australian Bureau of Statistics to implement a longitudinal study in the population census (a proposal requiring capacity to data match over time).[2] In 2004, PIAC made a joint submission with the Blue Mountains Community Legal Centre to the NSW Attorney General concerning the Review of the PPIP Act.[3]

PIAC has provided much needed co-ordination for consumer representatives involved in health privacy issues and development of electronic health records in NSW. The Centre has also been actively involved in various electronic heath record initiatives of the Federal Government, including the national medication records developed as part of the Better Medication Management Scheme and the Privacy (Private Sector) Amendment Bill 2000.

PIAC CEO, Robin Banks, is a member of the Privacy Advisory Committee (**PAC**), which provides strategic advice to the Federal Privacy Commissioner on privacy issues and the protection of personal information.

2. The NSW Law Reform Commission Privacy Reference

2.1 Terms of Reference

Pursuant to section 10 of the *Law Reform Commission Act 1967* (NSW), the New South Wales Law Reform Commission (**the Commission**) is to inquire into and report on whether existing legislation in New South Wales provides an effective framework for the protection of the privacy of an individual. In undertaking this review, the Commission is to consider in particular:

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1 Public Interest Advocacy Centre, *Health and Social Services Access Card: Submission to Access Card Consumer and Privacy Taskforce, Discussion Paper* (2006); Public Interest Advocacy Centre, *Access Card Proposal Still Fails Public Interest Test: Comment on the Exposure Drafts of the Access Card Legislation* (2007).

2 Public Interest Advocacy Centre, *Submission to the Australian Bureau of Statistics on Enhancing the Population Census: Developing a Longitudinal View* (2005).

3 Public Interest Advocacy Centre and Blue Mountains Community Legal Centre, *Submission to the New South Wales Attorney General on Review of the Privacy and Personal Information Protection Act 1998 (NSW)* (2004).

- the desirability of privacy protection principles being uniform across Australia;
- the desirability of a consistent legislative approach to privacy in the *Privacy and Personal Information Protection Act 1998*, the *Health Records and Information Privacy Act 2002*, the *State Records Act 1998*, the *Freedom of Information Act 1989* and the *Local Government Act 1993*;
- the desirability of introducing a statutory tort of privacy in New South Wales; and
- any related matters.

2.2 NSW Law Reform Commission *Consultation Paper 1 – Invasion of Privacy*

As a first step in carrying out its inquiry into the above Reference, the Commission released *Consultation Paper 1 (2007) Invasion of Privacy* (**the Consultation Paper**) on 6 July 2007. The Commission has invited submissions on the issues relevant to its review, including, but not limited to the issues and questions raised in the Consultation Paper.

PIAC welcomes the opportunity to comment on the Consultation Paper. PIAC believes that the Consultation Paper is comprehensive and of a high quality, and congratulates the Commission on its work around this issue.

The Consultation Paper focuses on the question of whether or not a statutory cause of action for the invasion of privacy should be introduced in New South Wales. PIAC understands that the Commission intends to use the results of consultation about this issue to inform the preparation of a second Consultation Paper to be released later in 2007, dealing with other aspects of the Reference. At this stage, PIAC confines its comments to issues relating to the desirability of introducing a statutory cause of action for invasion of privacy in New South Wales. PIAC will address other issues relevant to the Reference, including the desirability of uniform privacy protection principles across Australia, in its response to the second Consultation Paper and to the current Australian Law Reform Commission Inquiry into Privacy Law.

PIAC notes the **List of Questions** set out at pages xi–xii of the Consultation Paper. In this submission, PIAC addresses each of these questions in turn.

3. Privacy as a Human Right

The right to privacy is recognised in international law as a fundamental human right: the *Universal Declaration of Human Rights* (**UDHR**), the *International Covenant on Civil and Political Rights* (**ICCPR**) and in numerous other international instruments and treaties.[4] (It is worthy of note that Australia was a strong advocate for the UDHR and has ratified relevant conventions requiring States Parties to protect the right to privacy.) The right to privacy

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

has been described as 'one of the most important human rights issues of the modern age'.[5]

Article 17 of ICCPR states:

1. No person shall be subjected to arbitrary or unlawful interferences 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.[6]

In recent years, the right to privacy has been specifically enshrined in the human rights legislation of the Australian Capital Territory and Victoria. Section 13 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and section 12 of the *Human Rights Act 2004* (ACT) provide that a person has the right not to have his or her privacy, family, home or correspondence unlawfully interfered with, and not to have his or her reputation unlawfully attacked. Clause 11 of the consultation draft Human Rights Bill 2007 (WA) is in similar terms. Of some concern with respect to the these developments is the limited personal right to bring legal action for a breach of any of rights set out and the limited right to a remedy for such a breach. Further, all of these laws and proposed laws operate with respect to public authorities only and so, at this stage, cannot be said to provide a comprehensive protection of the right to privacy as set out in international law.

However, as yet, New South Wales has no broadly based human rights charter, and therefore no human rights framework or context in which the right to privacy can be asserted and interpreted consistently. PIAC regards it as absolutely fundamental that there be a legislatively entrenched Human Rights Charter in New South Wales that includes an enforceable right to privacy.

Recommendation 1

PIAC recommends that the New South Wales Government enact a Human Rights Act, or Charter of Rights, that includes an enforceable right to privacy.

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5 D Banisar (Electronic Privacy Information Centre) and Privacy International, *Privacy and Human Rights 2000: An International Survey of Privacy Laws and Developments,* p 1, viewed 2 October 2007, < http://www.privacyinternational.org/survey/phr2000/overview.html>.

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

4. PIAC's Response to the Commission's List of Questions

4.1 Should there be a general cause of action for invasion of privacy? Why or why not?

PIAC supports law reform to broaden the protection of privacy rights and interests that currently exist in the law in New South Wales. The existing legal framework is woefully inadequate and lags well behind regimes for the protection of privacy in overseas jurisdictions.

Justice Kirby has referred to 'the extraordinary capacity of technology today to offer fresh ways of invading privacy'.[7] There can be no doubt that the advent of technological developments, such as the internet and digital technologies, have made individual privacy increasingly vulnerable to attack. For example, technology now exists that make it possible for security agencies to track people via their mobile phones and to obtain information about their internet use in effectively real-time.[8] There is also an increased incidence of surveillance in all areas of public life, frequently justified as a counter-terrorism measure.[9]

Most Australians regard privacy as important and expect a high level of privacy protection. A National Survey commissioned by the Office of the Federal Privacy Commissioner in 2007 found that technological developments have increased Australians' privacy concerns. In particular, the survey found that 50% of Australians are more concerned about giving personal information over the internet than they were two years ago and 25% of Australians claim that they provide false information in online forms as a way of protecting their privacy.[10] The survey also found that 90% of Australians are concerned about businesses sending their personal information overseas.[11]

The current regulatory regime does not adequately protect the privacy of Australians. The *Privacy and Personal Information Protection Act 1998* (NSW) (**the PPIP Act**) and the *Privacy Act 1988* (Cth) (**the Privacy Act**) focus on information privacy and protection of data and fail to protect against invasions of privacy that involve interference with one's person or territory. There is a myriad of exemptions from both Acts, which undermines rather than modifies their effectiveness. Some of these include:

- The exemption for 'employee records' in the Privacy Act.[12]
- The exemption for small businesses from the Privacy Act.[13]

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7 The Hon Justice Michael Kirby, 'Privacy – In the Courts' [2001] *University of NSW Law Journal* 2.

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

9 *Ibid*.

10 Office of the Privacy Commissioner, *Media Release: National Privacy Survey – ID Theft, ID Scanning and Online Privacy Concerns Are On the Rise* (28 August 2007), viewed at 2 October 2007 <http://www.privacy.gov.au/news/media/2007_15.html>.

11 *Ibid*.

12 *Privacy Act 1988* (Cth) s 7B(3).

- The exemption for 'media organisations' from the Privacy Act.[14]
- Exemptions to the definition of 'personal information' in the PPIP Act.[15]
- The exclusion of State Owned Corporations from the definition of 'public sector agency' in the PPIP Act.[16] State Owned Corporations are legal entities created by the *State Owned Corporations Act 1989* (NSW) and are listed in Schedule 5 to that Act. They include the New South Wales Lotteries Corporation, Landcom and Rail Corporation New South Wales. It is of note that some of these are also not caught by the Privacy Act and, as such, are not obliged to comply with any privacy laws.[17]

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

In some instances, there has been a failure to enforce criminal laws that are intended to protect privacy. For example, section 11 of the *Children (Criminal Proceedings) Act 1987* (NSW) strictly prohibits and makes it a criminal offence to publish or broadcast the name, or any identifying information, of a young person who is involved in criminal proceedings at any time before, during or after the proceedings. Despite this, the media routinely identifies children and young people involved in criminal proceedings in New South Wales.[18] In PIAC's experience, criminal proceedings are rarely initiated where an offence pursuant to section 11 of the Act has been committed and PIAC is only aware of one successful prosecution of this offence to date.[19] As a consequence of failure to enforce the

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13 *Privacy Act 1988* (Cth) s 6C(1). The effect of this provision, when read in conjunction with the definitions of 'small business' and 'small business operator' in section 6D is that businesses with an annual turnover of $3 million or less have been exempt from the *Privacy Act 1988* (Cth). This exemption has been heavily criticised, as an estimated 94 percent of businesses fall below the limit: see, for example Parliament of Australia – House of Representatives Standing Committee on Legal and Constitutional Affairs, *Advisory Report on the Privacy Amendment (Private Sector) Bill 2000* (2000), chapter 2.

14 *Privacy Act 1988* (Cth) s 7B(4).

15 *Privacy and Personal Information Protection Act 1998* (NSW) s 4(3).

16 *Privacy and Personal Information Protection Act 1998* (NSW) s 1.

17 According to the NSW Privacy Commissioner, 'state-owned corporations have fallen through a gap in privacy regulation': Privacy NSW, *Submission to the NSW Attorney General on Review of the Privacy and Personal Information Protection Act 1998* (NSW) 127.

18 For example, Channel 7's *Today Tonight* program broadcast a story on 1 March 2005 that directly identified 'DR', one of two young persons killed as a result of a motor vehicle collision following a police pursuit in Macquarie Fields. The story also made false claims about DR's criminal history.

19 The successful prosecution of Alan Jones in the Local Court in relation to a broadcast on Radio Station 2GB in July 2005. The judgment, finding Jones guilty of the offence, is currently under appeal, with the hearing in the District Court concluded in late September, with Judge Michael Finnane reserving judgment on appeal.

law in this area, children and their families often endure negative consequences beyond the punishment meted out by the criminal justice system. For example, PIAC is aware of children who have experienced significant difficulties securing placements in schools and other educational and vocational institutions as a result of public disclosure of their involvement in the criminal justice system. In the absence of a general right to take legal action for invasion of privacy, there is limited legal recourse available to those affected by the media's flagrant disregard of the law.

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

- A man with an intellectual disability is filmed without his knowledge or consent while he is defecating in a public place. The film is subsequently shown on the internet.

- Personal information about a convicted inmate is disclosed to the media by the Department of Correctional Services. The inmate's spouse and children suffer hurt, humiliation and distress as a result. Although they can bring a complaint before the relevant public authority, they are not entitled to any monetary compensation if the complaint is upheld.[20]

- A NSW Police officer releases the name of a person suspected of a crime to the media, and asserts that the information related to 'core policing functions';[21]

- A woman who has suffered a back injury is subject to video surveillance by a security agency while she is performing activities at and around her home.

- A teenage girl suffers humiliation and distress upon finding out that she was secretly filmed while getting undressed in a change room in a shopping centre. Criminal charges are brought against the person who made the film, but the girl has no means of seeking any civil compensation.

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

In PIAC's view, there should be a general cause of action for invasion of privacy in New South Wales. The lack of such a cause of action is a significant gap in our legal framework.

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20 *Privacy and Personal Information Protection Act 1998* (NSW) ss 53(7A) and 55(4A)

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

Recommendation 2

PIAC recommends that there should be a general cause of action for invasion of privacy in New South Wales.

4.2 If there should [be a general cause of action for invasion of privacy in New South Wales] how should the boundaries of the cause of action be drawn?

PIAC agrees with the Commission's preliminary view that persons should be protected 'in a broad range of contexts' from unwarranted intrusions into their private lives or affairs.[22] If the boundaries of a cause of action for invasion of privacy are drawn too narrowly, the cause of action will be of limited use and will add little to the existing law.

On the other hand, PIAC recognises that the right to privacy is not an absolute right, and that it must be subject to checks and balances. If the boundaries of the cause of action are drawn too widely, there is a risk that the cause of action will become meaningless and that it will result in 'litigation bordering on the absurd'.[23]

In this submission, PIAC addresses the essential elements of a cause of action for invasion of privacy, and the contexts in which such an action should apply.

Recommendation 3

PIAC recommends that the boundaries of a general cause of action should be drawn so as to protect against invasions of privacy in a broad range of contexts.

4.3 Should the development of a cause of action for invasion of privacy be left to the common law, or should a statutory cause of action be created?

PIAC does not believe that the recognition of a cause of action for breach of privacy should be left to incremental development of common law through the courts. The reluctance of superior courts to date to embrace the cautious invitation extended by the High Court in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*[24] to develop a tort of privacy in Australia[25] suggests that common law development of such a tort may take a long time, and that it may never actually happen at all.

PIAC supports the Commission's provisional conclusion that if a cause of action for privacy is to be introduced into the law of New South Wales, it is preferable to do so by statute, rather than leaving it to common law development.[26] The creation of a statutory cause of action would have the following advantages over common law development:

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22 New South Wales Law Reform Commission, *Consultation Paper 1 - Invasion of Privacy* (2007) [1.20].

23 *Roberson v Rochester Folding Box Co* 64 NE 442, 447.

24 (2001) 208 CLR 199.

25 *Giller v Procopets* [2004] VSC 113 and *Kalaba v Commonwealth of Australia* [2004] FCA 763 cf *Grosse v Purvis* (2003) QDC 151 and *Jane Doe v Australian Broadcasting Corporation and ors* [2007] VCC 281.

26 New South Wales Law Reform Commission, above n22, [1.47].

- it is a less time-consuming process than waiting for appropriate cases to come before the courts;
- it provides greater certainty and uniformity by clarifying rights and responsibilities;
- it allows respondents to understand the scope of their obligations, to predict whether or not their conduct will give rise to legal liability for breach of privacy and to put into place appropriate procedures to minimise the risk of a breach;
- it avoids the need to try to fit breaches of privacy into pre-existing legal actions, such as breach of confidence;
- it does away with the distinction between equitable and tortious causes of action and allows for a more flexible approach to damages and remedies.
- it strengthens the recognition of privacy in the law as 'a right in itself deserving of protection'.[27]

A statutory case of action for invasion of privacy is consistent with regimes that apply in New Zealand, as well as in some Canadian provinces (British Columbia,[28] Manitoba,[29] Saskatchewan[30] and Newfoundland[31]). The Irish *Privacy Bill 2006,* when passed, will establish in Irish law a statutory 'tort of violation of privacy' of an individual in Irish law.[32]

PIAC notes, however, that a statute can always be repealed or watered down by the government of the day, or by subsequent governments. In recent years, the NSW Government has gradually watered down the PPIP Act through subordinate legislation and other statutory instruments on a number of occasions. On at least one occasion, the PPIP Act was amended without consultation with the Privacy Commissioner[33], as was the PPIP Regulation.[34] In addition, Section 25 of the PPIP Act effectively allows agencies to rely on even the hint of non-compliance under another Act or regulation to justify their non-compliance with almost all of the privacy principles.[35] This has had the effect of making

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27 *Jane Doe v Australian Broadcasting Corporation* [2007] VCC 281 [157] at [161].

28 *Privacy Act,* RSBC 1996, c 373 (British Columbia).

29 *Privacy Act,* CCSM, 1987, cP125 (Manitoba).

30 *Privacy Act,* RSS 1978, cP-24 (Saskatchewan).

31 *Privacy Act,* RSNL 1996, cP-22 (Newfoundland).

32 *Privacy Bill, 2006* (Ireland) see http://www.oireachtas.ie/documents/bills28/bills/2006/4406/b4406s.html.

33 The *Privacy and Personal Information Protection Amendment (Prisoners) Act 2002* (NSW) withdrew any right previously enjoyed by prisoners and former prisoners, their family members and associates to seek compensation for a breach of their privacy by conduct of a public sector agency in relation to the prisoner during the period of imprisonment. According to Privacy NSW, it was not consulted about this amendment. See Anna Johnston, 'Reviewing the NSW Privacy Act: Exemptions and Inadequacies' [2004] *Privacy Law and Policy Reporter* 35 at 37.

34 The *Privacy and Personal Information Protection Regulation 2000* (NSW) was amended in December 2003 to exempt the NSW Attorney General's Department from the public register provisions in Part 6 of the PPIP Act in relation to the register of Justices of the Peace. According to Privacy NSW, it was not consulted about or notified of this amendment. See Anna Johnston, 'Reviewing the NSW Privacy Act: Exemptions and Inadequacies' [2004] *Privacy Law and Policy Reporter* 35 at 37.

35 Section 25(b) of the *Privacy and Personal Information Protection Act 1998* (NSW) provides that a public sector agency is not required to comply with section 9, 10, 13, 14, 15, 17, 18 or 19 if non-compliance is otherwise permitted (or is necessarily implied or reasonably contemplated) under an Act or any other law (including the *State Records Act 1998*).

privacy protection 'a moveable feast, but moving in only one direction – away from the highest standards of privacy protection'.[36]

PIAC supports the creation of a statutory cause of action, but recommends that this be backed up the recognition of a right to privacy in a Charter of Rights. PIAC notes the Commission's concern that the absence of such a context potentially leaves the scope and operation of a legally enforceable right to privacy too uncertain.[37]

Recommendation 4

PIAC recommends that the development of a cause of action for invasion of privacy should not be left to the common law, but should be created by statute. However, such statutory protection should be underpinned by recognition in a Charter of Rights of an enforceable right to privacy.

4.4 If there should be a statutory cause of action for invasion of privacy, do you agree with the Commission's preferred statutory model (Proposal 1)? Why or why not? Are there others that would be more effective (for example, the creation of a statutory tort or torts?)

The Commission prefers a general statutory cause of action supported by a non-exhaustive list of examples of invasion. This preferred statutory model is set out in the Consultation Paper as follows:

> Proposal 1:
>
> If a cause of action for invasion of privacy is enacted in New South Wales, the statute should identify its objects and purposes and contain a non-exhaustive list of the types of invasion that fall within it.[38]

PIAC supports the Commission's preferred statutory model. PIAC considers that the model has the following advantages:

- It avoids having to specifically define the term 'privacy' (a step that could potentially limit 'privacy').
- It is open-ended and inclusive and allows for appropriate development of the law to meet changing social and technological circumstances.
- It strikes an appropriate balance between being a general, but structured, cause of action that will be able to guide the future development of the law.
- It is similar to models that already apply in Manitoba,[39] Saskatchewan,[40] Newfoundland and Labrador[41] and British Columbia[42] and that proposed in Ireland.[43]

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36 Anna Johnston, 'Reviewing the NSW Privacy Act: Expectations and Inadequacies' [2004] *Privacy Law and Policy Reporter* 35 at 38.

37 New South Wales Law Reform Commission, above n22, [1.41].

38 *Ibid*, [6.33].

39 *Privacy Act*, CCSM 1987 cP125 (Manitoba) s 2(1).

- The non-exhaustive list of types of invasions will give context to the cause of action and guidance as to when it might arise. It also recognises the diverse range of circumstances in which a breach of privacy might arise.

The Commission has suggested that a broad general statement concerning privacy could form part of an objects clause in any legislation establishing a cause of action for breach of privacy.[44] This could provide a general statement of legislative intent and values inherent in the concept of privacy.[45] While PIAC agrees with this, PIAC also considers that it is important that the purpose and intention of the legislation be spelled out clearly and consistently in other instruments of statutory interpretation, including the preamble, Explanatory Memorandum and Second Reading speech.

PIAC notes the Commission's example of an objects clause:

> This Act enables an individual to bring an action before the courts seeking redress of an invasion of his or her privacy. Privacy is recognised as an important human right and social value, interpreted most succinctly as the 'right to be let alone'.
>
> Privacy is a broad concept based on individual autonomy, dignity, liberty, and the freedom to make choices that affect one's personal life. Privacy also has an important social dimension, since a society is characterised by the rights and freedoms enjoyed by its citizens.
>
> However, like all rights and freedoms, privacy is not absolute, but must be balanced against other interests, values and human rights in the context of the merits of each case.[46]

Generally, PIAC supports the proposed objects clause. However, PIAC is concerned about the wording of the third paragraph, namely: 'privacy … must be balanced against other interests, values and human rights' (emphasis added). PIAC accepts that privacy is not an absolute right, and that it must be balanced against other human rights and freedoms (such as the right to freedom of expression and actions needing to be taken in a national emergency). However, to require privacy to also be balanced against other 'interests and values' is excessive. These are very loose, subjective terms that are open to extremely wide interpretation. Arguably, they could extend to business interests, government interests, or even an interest in the dissemination of gossip. It is inappropriate that privacy, as a fundamental human right, should be traded off against such factors. In PIAC's view, the third paragraph should be re-worded as follows:

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40 *Privacy Act*, RSS 1978 cP-24 (Saskatchewan) s 2.
41 *Privacy Act*, RSNL 1990, cP-22 (Newfoundland and Labrador) s 3(1).
42 *Privacy Act*, RSBC, 1996, c373 (British Columbia) s 1(1).
43 *Privacy Bill 2006* (Ireland) cl 2(1).
44 New South Wales Law Reform Commission, above n22, [6.28].
45 *Ibid*, [6.30].
46 *Ibid*.

> However, like all rights and freedoms, privacy is not absolute, but must be balanced against other human rights and freedoms in the context of the merits of the particular circumstances.

Ideally, the statutory cause of action should be buttressed by a NSW Charter of Rights that recognises the right to privacy as a fundamental right. Having the right to privacy entrenched in a Charter of Rights would help to establish a culture in which there is a greater awareness of, respect for, and observance of this right at all levels of government and throughout the community. This in turn may lead to changes in the attitudes and conduct of people and organisations.

PIAC agrees with the Commission's suggestion that the cause of action should be expressed in terms of a right of action for invasion of privacy, rather than as a tort of violation of privacy.[47] While PIAC notes that some jurisdictions have a statutory tort for invasion of privacy[48], it is anticipated that there would be problems with this formulation in New South Wales, as it could lead to the cause of action being restricted by certain aspects of tort jurisprudence such as apportionment legislation and limitation periods. PIAC also notes that a cause of action for invasion of privacy may involve consideration of competing interests including the public interest and freedom of speech, that have not traditionally been relevant in the development of tortious causes of action.

Recommendation 5

PIAC agrees with the Commission's preferred statutory model (Proposal 1).

Recommendation 6

PIAC supports the Commission's example of an objects clause, with the exception of the third paragraph. PIAC recommends that the third paragraph be reworded as follows:

> *However, like all rights and freedoms, privacy is not absolute, but must be balanced against other human rights and freedoms in the context of the merits of the particular circumstances.*

4.5 When should plaintiffs be entitled to an expectation of privacy?

PIAC favours an objective test for determining whether or not a plaintiff is entitled to have an expectation of privacy. Most formulations refer to the need to show that the plaintiff had 'a reasonable expectation of privacy' in relation to the relevant conduct or information, and PIAC notes that the Commission has suggested this as a possible test.[49]

We consider that the 'reasonable expectation' test is fluid enough to take account of factors such as the nature and incidence of the act, conduct or publication, the age and

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47 New South Wales Law Reform Commission, above n22, [1.5]-[1.7]

48 See for example *Privacy Act* RSBC 1996 c 373(British Columbia); *Privacy Act,* CCSM 1987 cP125 (Manitoba); *Privacy Act,* RSS 1978 cP-24(Saskatchewan; *Privacy Act,* RSNL 1996 cP-22(Newfoundland); *Privacy Bill, 2006* (Ireland).

49 NSW Law Reform Commission, above n22, [7.5]

circumstances of the plaintiff, the relationship between the parties, and the place where the alleged invasion of privacy took place.

Recommendation 7

PIAC considers that a plaintiff will be entitled to a 'reasonable expectation of privacy' in relation to the relevant conduct or information.

4.6 What type of invasion should attract the protection of the proposed cause of action?

PIAC also considers that an objective test should apply when determining the type of conduct that should attract the protection of the proposed cause of action.

PIAC notes that Gleeson CJ in the *Lenah Game Meats* case suggested an objective test in terms of what would be 'highly offensive to a reasonable person of ordinary sensibilities'.[50] However, in PIAC's opinion, this may set too high a threshold. PIAC notes the comments of Nicholls LJ in *Campbell v MGN Ltd* that the:

> … highly offensive formulation can all too easily bring into account, when deciding whether the disclosed information was private, considerations which go more properly to issues of proportionality; for instance, the degree of intrusion into private life, and the extent to which the publication was a matter of proper public concern. This could be a recipe for confusion.[51]

A more appropriate test of seriousness may be where the act complained of would be regarded as offensive to a reasonable person of ordinary sensibilities.

PIAC notes the Commission has set out the following example of the types of invasions of privacy that a statutory cause of action might seek to remedy:

> A person would be liable under this Act for invading the privacy of another, if he or she:
>
> (a) interferes with that person's home or family life;
>
> (b) subjects that person to unauthorised surveillance;
>
> (c) interferes with, misuses or discloses that person's correspondence or private written, oral or electronic communications;
>
> (d) unlawfully attacks that person's honour and reputation;
>
> (e) places the individual in a false light;
>
> (f) discloses embarrassing facts relating to that person's private life;

50 *Australian Broadcasting Commission v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at [42]

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

(g) uses that person's name, identity, likeness or voice without authority or consent.

This list should be interpreted as illustrative and not exhaustive.[52]

PIAC considers that a non-exhaustive list of this nature is a helpful way of giving context to the types of conduct that may give rise to an action for invasion of privacy. PIAC believes, however, that example (b) should be extended to also make it an invasion of privacy if a person discloses information, documentation or material obtained by unauthorised surveillance. In many cases, it is not just the act of surveillance itself that leads to an invasion of privacy, but also the subsequent use that is made of material gained during surveillance (for example, publication of the material by the media). PIAC notes that the proposed privacy legislation in Ireland covers disclosure of surveillance material.[53]

Recommendation 8

PIAC considers that an invasion of privacy should attract the protection of the proposed statutory cause of action where it would be regarded as offensive to a reasonable person of ordinary sensibilities.

Recommendation 9

PIAC recommends that the following be added to the Commission's proposed non-exhaustive list of the types of conduct that may amount to an invasion of privacy:

discloses information, documentation or material obtained by unauthorised surveillance.

4.7 When should the plaintiff be taken to have consented to an invasion of privacy?

It is important to recognise that some people may have limited or no capacity to meaningfully give or refuse consent to an invasion of privacy. For example, minors, people in detention, people with intellectual disability and people with mental illness may face barriers in exercising their privacy rights, including consent.

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

Lack of consent could be stipulated as essential element of cause of action (as in the proposed Irish legislation),[54] or a matter to be considered when assessing reasonableness, or as an exception to the cause of action or as a defence.

PIAC notes that in some circumstances, it may actually be impossible to refuse consent to what may potentially be a breach of privacy. For example, one cannot meaningfully

52 New South Wales Law Reform Commission, above n22, [6.31].

53 *Privacy Bill, 2006* (Ireland) cl. 3(2)(b).

54 *Privacy Bill* (Ireland) cl 3(c).

consent or otherwise to being subjected to video surveillance when standing in a lift or using an automatic teller machine. In most, if not all such circumstances, there is no alternative to using the particular facility to access services.

A further problem is that people are frequently unaware that they are being subjected to surveillance. The *Workplace Surveillance Act 2005* (NSW) requires employers to notify their employees about camera, computer or tracking surveillance, unless the employer has a covert surveillance authority granted by a Supreme Court judge. However, there is no similar legislative requirement to disclose the use of electronic or other surveillance in circumstances other than the workplace (for example the use of CCTV in parking lots and streets or the taking of photographs or video footage of people in crowded places so that these can be matched to photographs contained in police databases using facial recognition technology[55]). If there is to be a statutory cause of action for invasion of privacy, consideration needs to be given to whether there should also be legislated obligations to disclose the use of video or other surveillance wherever it is used. Arguably, without such obligations, any consent is illusory.

Recommendation 10

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

4.8 Should liability for invasion of privacy in relation to disclosure of information be restricted to information not already in the public domain, and if so, how should the concept of public domain be construed?

Where personal information has been released already, or forms part of a public record, a plaintiff should not necessarily be precluded from bringing an action for invasion of privacy based on the release or re-release of that information.

The collection, use and disclosure of information about a person from publicly available sources can still have considerable privacy impacts. For example, information in the public domain would arguably include press clippings, which might contain inaccurate information, or accurate information that is open to misinterpretation.

Information may still be private and personal to the plaintiff, despite the fact that it has been published, or is contained in a public record (for example, a person's criminal record, their HIV status, or the fact that they are a rape victim). Although, technically, the public can access many records, access to them may be constrained in reality by practical and logistical constraints, such as the need to pay a fee.[56]

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55 Such technology has been used at the US Super Bowl: see Peter Slevin, 'Focus on fans has them for and agin', *The Age,* 11 February 2001.

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

In some cases information could be in the 'public domain' erroneously or unlawfully. For example, a copy of a letter from the manager of an organisation to an employee reprimanding the employee for unprofessional conduct might be leaked to persons outside the organisation, including the media.[57] In cases such as this, the plaintiff should not be denied a remedy.

Recommendation 11

PIAC recommends that a plaintiff should not be precluded from bringing an action for invasion of privacy in relation to information that is already in the public domain.

4.9 Should liability for a cause of action for invasion of privacy be restricted to intentional acts only, or extend to reckless and/or negligent acts?

There can be no doubt that a person or entity should be liable for acts that deliberately or wilfully invade a plaintiff's privacy. However, limiting liability to intentional acts would narrow the scope of the cause of action unacceptably and encourage indifference to breaches of privacy.

PIAC considers that liability should also extend to reckless acts, where, for example, the defendant deliberately ignored a risk of harmful consequences arising from an action, or failed to give any thought to whether there was any such risk.

PIAC notes that the Commission suggests that 'including liability for negligent or accidental acts in relation to all invasions of privacy would, arguably go too far'.[58] PIAC does not accept this view and believes that negligent acts can, in some cases, lead to extremely serious breaches of privacy, where the impact can be just as serious for the plaintiff as those of a deliberate or reckless breach. For example, in one matter, PIAC represented a client whose medical records had been exposed on the internet by an employee of the hospital that had been treating her. Although the breach of privacy was negligent rather than deliberate, the impact on the client was catastrophic because of her vulnerability and the sensitivity of the information disclosed, which included information about her psychiatric treatment.

Many systemic breaches of privacy may be due to negligence, rather than to reckless or intentional acts. For example, an organisation with inadequate security procedures might unwittingly release personal information about a number of its clients. It is inappropriate that victims of these breaches of privacy should have no recourse to legal action. Restricting liability to reckless or intentional acts may also discourage organisations from taking steps to ensure that their privacy managements systems are adequate and may encourage indifference to privacy protection.

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

58 New South Wales Law Reform Commission, above n22, [7.24].

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

Recommendation 12

PIAC recommends that liability for invasion of privacy be extended to reckless and/or negligent acts.

4.10 How should a cause of action for invasion of privacy take account of the public interest?

The Commission proposes that a statutory cause of action for invasion of privacy should take account of the 'public interest'.[59]

Like the term 'privacy' the term 'public interest' is not easy to define. It has been characterised by Lord Denning MR as 'a matter that is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on, or what may happen to them or others'.[60]

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

However, it should not be forgotten that there is also a significant 'public interest' in maintaining privacy and upholding confidences.[61] If people don't feel their privacy is going to be protected, they will be less inclined to be forthcoming with information, and may provide misleading information. Therefore, a statutory cause of action for the invasion of privacy should not set up the right to privacy against the 'public interest'. Rather, the statute should require a careful weighing up of the public interest in maintaining privacy with any countervailing public interest requiring disclosure.

It will also be important that the statute clarify the point at which the 'weighing up' process is to occur. One option is for the 'public interest' to feature as an element of the cause of action itself, so that the plaintiff has to establish that in the particular case the public interest in their privacy outweighs any public interest asserted by the defendants. Alternatively, the 'public interest' issue could be addressed when considering whether there is a defence to an invasion of privacy.

PIAC prefers the latter approach. PIAC submits that the former approach would place an unreasonably onerous evidentiary burden on plaintiffs and is likely to discourage the bringing of claims under the statute. Further, the question of balancing countervailing public interests only arises where the defendant seeks to rely on a public interest defence.

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59 New South Wales Law Reform Commission, above n22, [7.26]

60 *London Artists Ltd v Littler* [1969] 2 QB 375 at 391.

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

PIAC notes that jurisdictions that currently provide for a statutory cause of action for invasion of privacy generally do so within a broader constitutional or human rights frameworks that recognise a 'right to privacy' alongside other rights, concerns and freedoms, such as freedom of speech and national security. Without privileging one right over the other, courts in these jurisdictions engage in a delicate balancing act, giving appropriate weight to the various rights, concerns and freedoms based on the facts at hand. PIAC reiterates the need for a NSW Charter of Rights that specifically recognises an enforceable right to privacy to enable this balancing process to be fully implemented.

Recommendation 13

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

4.11 What public interest factors should qualify an otherwise actionable invasion?

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

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

PIAC notes that some jurisdictions take into account the 'newsworthiness' of information when considering whether or not the right to freedom of expression should qualify the right to privacy.[62] PIAC considers that this test is too broad, and in danger of privileging freedom of expression over privacy to the extent that a statutory cause of action for the protection of privacy could be rendered meaningless. It is important to distinguish between whether it is in the public interest to make something known, or whether it is simply 'interesting' to the public to make something known. PIAC favours a 'legitimate public concern' test as was applied in the New Zealand case of *Hosking v Runting*.[63] This test considers whether there is legitimate public concern in the information or material to justify publication and whether in the circumstances those to whom publication is made can reasonably be said to have a right to be informed of it.[64]

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

63 [2005] 1 NZLR 1.

64 *Hosking v Runting* [2005] 1 NZLR 1 [133] – [134].

A further factor that would properly qualify the right to privacy is the freedom of political communication implied in the *Constitution*. The High Court has held that there is implied in the *Constitution* a freedom of communication on political and governmental matters.[65] This prevents the Commonwealth, States and Territories from introducing laws that restrict communication on political and governmental matters in a manner that is inconsistent with Australia's system of representative government.

The public interest may sometimes also require disclosure of matters relating to national security, the commission of criminal offences or threats to public health or safety.

Recommendation 14

PIAC considers that the public interest factors that may qualify a right to privacy include freedom of expression, freedom of political communication, threats to national security, potential criminal conduct and threats to public health or safety.

4.12 Should the plaintiff be required to prove loss or damage in order to bring an action for invasion of privacy?

PIAC considers that it would be inappropriate and potentially very restrictive to require a plaintiff to prove that any actual loss or damage arose from the alleged invasion of privacy.

In many cases there will be a lack of clear, provable damage arising from a breach of privacy. The majority of the clients for whom PIAC has acted in breach of privacy matters have suffered distress, humiliation and insult as a result of invasions of their privacy, rather than any provable psychiatric or economic damage. In some cases, the effect of a breach of privacy may simply be to prevent someone from doing something that they would normally do. For example, if they have been subjected to unwarranted surveillance, they may feel reluctant to leave their home. In this type of situation, it is difficult to point to any provable damage in a legal sense.

PIAC notes that the privacy statutes of British Columbia, Saskatchewan, Manitoba, Newfoundland and Labrador all provide that the tort of violation of privacy is actionable *per se*[66], as does the Privacy Bill currently before the Irish Parliament.[67] PIAC supports this approach, seeing it as being consistent with privacy being a fundamental human right, and as such, a right that should actionable without proof of damage.

Recommendation 15

PIAC recommends that the plaintiff not be required to prove loss or damage in order to succeed in an action for breach of privacy.

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65 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 523.

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

67 *Privacy Bill 2006* (Ireland) cl 2(2).

4.13 Should an action for invasion of privacy be available only to natural persons or should it be available to corporations as well? If so, when?

Privacy is a *human* right, concerned with dignity and the value of lives of human beings. It is therefore inappropriate that the right to privacy extend to corporations. To allow corporations to bring an action for invasion of privacy suggests that privacy is about commercial or property interests, rather than about dignity and personal autonomy.

PIAC notes the comments of Gleeson CJ in *ABC v Lenah Game Meats Pty Ltd:*

> Some forms of corporate activity are private. For example, neither members of the public, nor even shareholders, are ordinarily entitled to attend directors' meetings… However, the foundation of much of what is protected, where rights of privacy, as distinct from rights of property, are acknowledged, is human dignity. This may be incongruous when applied to a corporation.[68]

Corporations have adequate protection using other remedies such as causes of action based on property rights, contractual obligations, breach of confidence and injurious falsehood. Allowing corporations to rely on protections for human rights could potentially interfere with legitimate government attempts to regulate the activities of corporations for the benefit of the public.[69]

Recommendation 16

PIAC recommends that a statutory cause of action for invasion of privacy should only be available to natural persons.

4.14 Should an action for invasion of privacy come to an end with the death of the person whose privacy is alleged to have been invaded?

PIAC notes that most existing statutory causes of action for invasion of privacy lapse with the death of the person whose privacy has allegedly been invaded.[70] This is consistent with the position under the *Defamation Act 2005* (NSW)[71] and can be seen as flowing from the fact that the right to privacy is generally seen as a personal right. It has also been justified on the basis that because the main mischief of an invasion of privacy is the

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68 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 [43] (per Gleeson CJ; see similar comments by Gummow and Hayne JJ at [132].

69 See, for example, *McDonald Inc v Canada* [1995] 3 SCR 199 where a tobacco company was able to successfully challenge Canadian legislation that restricted the sale and advertising of tobacco products without a health warning, using human rights legislation.

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

71 *Defamation Act 2005* (NSW) s 10.

mental harm and injured feelings suffered by an individual, only living individuals should be allowed to seek relief.[72]

However, some actions may have a considerable impact on the privacy of the relatives of a deceased person (for example, the taking of photographs of their remains, or the publication of an article containing embarrassing information about their private life, or the manner in which they died). In these circumstances, it is appropriate that the relatives of the deceased person have some means of seeking compensation, or restraining further breaches of privacy. PIAC notes that in France, the right to privacy survives the death of the aggrieved and may be enforced by family of deceased.[73]

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

> Although it will rarely be appropriate for the estate to be awarded damages, the larger issues of principle which are involved should not die with the complainant. For example, policies or practices applied to the complainant may need to be changed so that discrimination does not occur in the future.[74]

There is now provision in the *Anti-Discrimination Act 1977* (NSW) (**ADA**) for a complaint to survive the death of a complainant and for the legal personal representative of the complainant to continue carriage of the complaint.[75] PIAC suggests that the Commission give consideration to a similar provision in any legislation setting up a statutory cause of action for invasion of privacy, so that an action can be maintained after a person's death, at least in circumstances where important systemic issues are involved. Like discrimination, invasion of privacy can be characterised as a societal wrong. The Commission's proposed objects clause specifically recognises this, by referring to the 'social value' of privacy and the fact that '[p]rivacy … has an important social dimension, since a society is characterised by the rights and freedoms enjoyed by its citizens'.[76] The continuation of a cause of action for invasion of privacy after a person's death may assist in achieving the societal objects of the proposed legislation, regardless of whether or not it results in a personal remedy.

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

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

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

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

76 New South Wales Law Reform Commission, above n22, [6.30].

Recommendation 17

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

4.15 How should invasion of privacy deal with 'relational claims'?

A relational claim would allow a plaintiff to bring an action for invasion of privacy by alleging that he or she suffers 'injury' from publicity about another person, simply by reason of his or her relationship with that person. PIAC considers that there may be situations in which such an action is warranted. These might include where:

- a child suffers emotional distress as a result of the publication by the media of a picture of their deceased parent;
- a parent suffers hurt and humiliation (or worse, such as workplace discrimination) because of disclosure by the media of their child's criminal record;
- publicity about a person having a genetic illness might cause that person's relatives to suffer injury and embarrassment (or worse) through the implication that they also have that genetic condition.

PIAC recognises, however, that there may be practical problems with such an approach, as arguably, it may require a person to consider the interests of others before he or she can consent to what would otherwise be an invasion of his or her privacy.

Recommendation 18

PIAC recommends that in certain limited circumstances, plaintiffs should be able to bring 'relational' claims.

4.16 Do you agree with the Commission's approach to the remedies that should be available in response to an invasion of privacy (Proposal 2)?

Proposal 2 states:

> The statute should provide that where the court finds that there has been an invasion of the plaintiff's privacy, the Court may, in its discretion, grant any one or more of the following:
>
> - damages, including aggravated damages, but not exemplary damages;
> - an account of profits;
> - an injunction;
> - an order requiring the defendant to apologise to the plaintiff;
> - a correction order;
> - an order for the delivery up and destruction of material;
> - a declaration;

- other remedies or orders that the Court thinks appropriate in the circumstances.[77]

Subject to the discussion and recommendation below and in section 4.18 dealing with exemplary damages and section 4.19 dealing with account for profits, PIAC agrees with the Commission's approach to setting out a range of remedies that should be available to a person aggrieved by an invasion of his or her privacy. Breaches of privacy may arise in a wide range of circumstances, and it therefore seems appropriate to enable the court to tailor the remedy to the breach that occurred.

PIAC also considers that there may be some benefit in including a remedy that expressly gives the Court power to order implementation of policy or procedures to protect against repetition of the breach. PIAC notes that there is provision in section 108(2)(e) of the ADA for the Administrative Decisions Tribunal (**ADT**) to order the respondent to a vilification complaint to develop and implement a program or policy aimed at eliminating unlawful discrimination. PIAC submits that a similar provision in any legislation dealing with invasion of privacy would help to prevent further breaches of privacy and would also assist in bringing about cultural change in organizations that fail to take their privacy obligations seriously.

PIAC considers, however, that it is important that the list of remedies should be kept simple with no statutory prescriptions as to the relationship between them. This would give the courts scope to develop in case law the circumstances in which individual remedies should be awarded.

Recommendation 19

PIAC recommends that Proposal 2 also include a remedy allowing the Court to order implementation of policy or procedures to protect against repetition of breaches of privacy.

Enforceability of non-monetary remedies

PIAC supports the inclusion of non-monetary orders (such as declarations and apologies) in the list of remedies, as there will be many situations where these will provide the most appropriate form of relief for an invasion of privacy. However, in order to ensure that justice is actually achieved for complainants whose complaints have been proven, it will be important to have provision in the statute for the enforcement of non-monetary orders.

PIAC notes that non-monetary orders of the ADT can be enforced as a judgement of the Supreme Court once the Registrar of the ADT has filed a certificate outlining the terms of the order.[78] There is also provision in section 108(7) of the ADA for the ADT to order that the respondent pay to the complainant damages not exceeding $40,000 if it fails to comply with an order of the ADT within a specified time set by the ADT. PIAC supports

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77 New South Wales Law Reform Commission, above n22, [7.60]. Proposal 2.

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

the inclusion of similar provisions in a statute establishing a cause of action for invasion of privacy.

Systemic privacy breaches

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

PIAC notes that section 108(3) of the *Anti-Discrimination Act 1977* (NSW) provides:

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

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

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

Recommendation 20

PIAC recommends that the statute also incorporate provisions enabling the relevant Court or Tribunal to enforce non-monetary orders, and to address systemic breaches of privacy.

4.17 Should there be thresholds and ceilings on the amount of damages that can be awarded in proceedings brought for the invasion of privacy? If so, what should they be?

The Commission has suggested that statutory thresholds be considered in actions for invasion of privacy as this may be a means of discouraging frivolous or trivial claims.[79] PIAC is concerned, however, that the imposition of thresholds of this nature would be inappropriate, given the difficulties outlined above of proving actual damage in privacy cases. Complaints that are frivolous, misconceived, vexatious or lacking in substance, could be dealt with by way of a provision allowing for these to be dismissed at an early stage of the proceedings. PIAC notes that provisions enabling early dismissal for these reasons apply in a range of legislation, including in the ADA.[80]

PIAC also opposes the imposition of a ceiling on the amount of damages for non-economic loss that can be awarded for invasions of privacy. PIAC recommends that damages should be unlimited. The problem with a ceiling is that if it is set too low, it will be inadequate to redress unlawful conduct, and will fail to deter recidivist respondents.

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79 New South Wales Law Reform Commission, above n22, [8.23].

80 *Anti-Discrimination Act 1977* (NSW) s 92(1)(a)(i).

PIAC notes that the ADA has a $40,000 cap on damages[81], and that this statutory cap has been the subject of much criticism.[82] A further problem is that any increase to the ceiling requires statutory amendment, which can be a time-consuming and politically fraught process.

If damages are to be limited, they should be set at the current limit for the District Court (or $250,000, in accordance with defamation legislation).

Recommendation 21

PIAC recommends that there be no threshold for damages for invasion of privacy and that damages for invasion of privacy be unlimited.

4.18 Should exemplary damages be available for invasion of privacy? Why or why not?

Exemplary damages are an exception to the general rule that the purpose of damages is to restore the plaintiff's position as far as is possible to what it was before the wrong occurred. They are a means of punishing the defendant and deterring him or her (and others) from future violations.

PIAC notes that the Commission has expressed doubts about whether punitive damages have a proper role in the civil law.[83] However, PIAC considers that there may be circumstances where an invasion of privacy may be of such a malicious or high-handed nature that it warrants an award of exemplary damages. PIAC also considers that the threat of exemplary damages may serve as a deterrent, thereby giving some 'teeth' to the legislation. PIAC notes that the Irish *Privacy Bill* proposes allowing an award of exemplary damages.[84]

Recommendation 22

PIAC recommends that exemplary damages be available for breaches of privacy.

4.19 Should account of profits be available in response to an invasion of privacy? Why or why not?

PIAC supports the use of orders for account of profits in response to invasions of privacy as an alternative to compensatory damages. PIAC notes, with interest, that clause 8(1)(c)of Ireland's *Privacy Bill 2006* allows the court to order the defendant to pay to the plaintiff damages equal to any, or any likely, financial gain accruing to the defendant as a result of the violation of the plaintiff's privacy.

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

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

83 New South Wales Law Reform Commission, above n22, [8.15]

84 *Privacy Bill 2006* (Ireland) cl 8(4)

Orders of this nature will prevent unjust enrichment of respondents and will also act as a deterrent in the case of 'serial respondents', or respondents who are unlikely to be particularly adversely affected by being ordered to pay compensatory damages. An example of such a respondent would be a publisher who undertakes a risk benefit analysis to deliberately calculate whether or the profits likely to be made from the sale of their magazine, book, etc, would outweigh any damages that they may have to pay to a plaintiff for breaching their privacy.

Recommendation 23

PIAC recommends that orders for account of profits be available in response to an invasion of privacy.

4.20 Should the courts be able to order apologies and correction orders in response to an invasion of privacy? If so, when?

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

PIAC notes that section 108(2) (d) of the *Anti-Discrimination Act 1977* (NSW) provides that the ADT can order the respondent to publish an apology or a retraction (or both) in respect of the matter the subject of the complaint, and, as part of the order, give directions concerning the time, form, extent and manner of publication of the apology or retraction (or both). PIAC recommends that a similar provision be enacted in any statute dealing with invasion of privacy.

PIAC reiterates its earlier comments about the need to have some means in the statute for enforcing non-monetary orders such as apologies and correction orders.

Recommendation 24

PIAC recommends that courts should be able to order apologies and correction orders in response to invasions of privacy.

5. Liability

The case of *Director General, Department of Education and Training v MT* [2006] NSWCA 270 highlights a serious deficiency in the liability provisions of the PPIP Act. In that case, PIAC acted for MT, a student from a state school who claimed that the Department had breached her rights under the PPIP Act because a teacher at the school had accessed and disclosed to a local sporting club—where she played sport—information about her health. The teacher was also a coach at the club.

The case was on appeal from the ADT Appeals Panel, which found that the Department had breached several Information Privacy Principles. The Department argued before the

Court of Appeal that it was not responsible for the teacher's conduct, because the teacher was not acting in his role as a teacher at the time, and that his conduct was for the purposes of the soccer club, rather than for the purposes of the Department.

The Court of Appeal held that the Department was not liable for the use or disclosure of the information by the teacher. According to the Court, the legislative scheme of the Act indicated an intention to restrict the liability of agencies to circumstances where employees are acting in the course of their employment.[85]

The effect of the decision in MT has been to severely curtail the ability of individuals to seek remedies for a breach of privacy. It effectively limits the liability of agencies to conduct that has taken place where an employee is acting in the course of their employment. Applicants whose privacy has been breached in situations where an employee has clearly acted outside the scope of their official functions (arguably more serious breaches of privacy) are unlikely to pursue their complaints under the PPIP Act.

In order to prevent a similar situation arising under proposed new legislation for invasion of privacy, it will be crucial that that the legislation contain clear provisions setting out the circumstances where employers and principals will be liable for the acts of employees and agents.

PIAC notes that section 53(1) of the ADA provides that a principal or employer is liable for the acts of its agents or employees:

> … unless the principal or employer did not, either before or after the doing of the act, authorise the agent or employee, either expressly or by implication, to do the act.

Section 53(3) of the ADA provides that a principal or employer will avoid liability if they can demonstrate that they have taken 'all reasonable steps' to prevent the agent or employee from breaching the Act. In the circumstances in *MT* it would have been strongly arguable that the Department's failure to properly secure the information would result in a finding that it had not taken 'all reasonable steps' to prevent the agent or employee from breaching the Act.

PIAC submits that similar provisions be included in any statute dealing with invasion of privacy.

Recommendation 25

PIAC recommends that any statute providing for a cause of action for invasion or privacy incorporate liability provisions similar to those that exist in section 53 of the ADA.

85 *Director General, Department of Education and Training v MT* [2006] NSWCA 270 at [42].

6. Access to Justice

It is vitally important that any statutory cause of action for invasion of privacy be accessible to those seeking to use it. Otherwise, there is a risk that a breach of privacy action could become the sole province of celebrities and those wealthy enough to afford to pay for legal representation and run the risk of incurring an adverse costs order in the event that they are unsuccessful.

Measures to ensure that the cause of action is accessible include:

- The statute should provide that parties to proceedings should generally bear their own costs and that costs orders should only be made in exceptional circumstances (for example, where the complaint is vexatious). This is likely to protect genuine complainants having costs orders made against them if they are unsuccessful. However, the legislation should be sufficiently flexible to allow for the making of awards of costs in circumstances where a respondent has acted unreasonably in defending the complaint, or the amount of compensation recovered by the complainant is inadequate to cover their legal costs. [86]
- The statute should provide for representative proceedings and class actions to be taken, so as to reduce the burden on individual complainants.
- The statute should provide that in certain circumstances (perhaps involving matters of serious or systemic privacy invasion) the NSW Privacy Commissioner may initiate a complaint.

6.1 Provision for Suppression Orders

By their very nature, cases concerning alleged invasions of privacy will often deal with matters of a confidential, embarrassing or sensitive nature. Recently one of PIAC's clients elected not to proceed with a test case breach of privacy action in the District Court due to her concerns about the publicity that her case might attract, and the further impact that this might have on her privacy.

So that other plaintiffs will not be deterred from pursuing meritorious claims, it is vital there be provision for the protection of the plaintiff's confidentiality in any proceedings for invasion of privacy. For example, Courts should be able to make suppression orders, non-publication orders and orders that hearings be closed to the public for the purpose of protecting a person's privacy.[87] PIAC notes that there are provisions to this effect in section 75 of *Administrative Decisions Tribunal Act 1997* (NSW), which could serve as a suitable model. However, PIAC supports the view that to the greatest extent possible legal proceedings should be held in open courts to enable public scrutiny of the legal process. As such, courts should be required to use the least restrictive approach to maintaining the protection of a plaintiff's privacy.

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86 *Jordan v North Coast Area Health Service (No.3)* [2005] NSWADT 296.

87 See, for example, *Privacy Bill* 2006 (Ireland) cl 13.

Recommendation 26

PIAC recommends that any statute for invasion of privacy incorporate provisions that will ensure that it is accessible for applicants.

Recommendation 27

PIAC recommends that any statute for invasion of privacy incorporate provisions that will protect the plaintiff's confidentiality.

7. Conclusion

PIAC supports the introduction of a general, statutory cause of action for the invasion of privacy in New South Wales. There can be no doubt that the time has come to take the 'bold step'[88] of implementing extensive law reform in this area. However, it is vitally important that any statute dealing with invasion of privacy be carefully framed so that it allows Courts or Tribunals to clearly identify invasions of privacy and the circumstances in which they should be remedied. It is also important that the cause of action is accessible to applicants and that remedies for breach of invasion of privacy are effective and enforceable. Ideally, the statute should also be backed up by the recognition of an enforceable right to privacy in a Charter of Rights. Without these measures in place, any right to individual privacy in New South Wales is likely to remain a hollow one.

88 *Jane Doe v Australian Broadcasting Corporation and ors* [2007] VCC 281, per Hempel J at [157].