Resurrecting the Right to Privacy:

Response to Australian Law Reform Commission Discussion Paper 72: Review of Australian Privacy Law

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Introduction

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 income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

PIAC's Expertise in Privacy Law

PIAC has a long history of interest in, and concern about, the appropriate protection of privacy rights within both the public and private sectors. PIAC has been a strong advocate for the protection of the privacy rights of Australians, particularly the rights of individual Australians to control their personal information and to be free of excessive intrusions. 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**) and the Privacy Act 1988 (Cth) (**the Privacy Act**). In 2006, 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. In another matter, currently before the Office of the Privacy Commissioner (**OPC**) 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 October 2007, PIAC made a submission to the New South Wales Law Reform Commission (**NWSLRC**) in relation to NSWLRC Consultation Paper 1 – Invasion of Privacy.[3]

PIAC Chief Executive Officer, 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.

The Australian Law Reform Commission (ALRC) Review of Australian Privacy Law

PIAC welcomes the Australian Law Reform Commission's Review of Australian Privacy Law and appreciates having the opportunity to respond to Discussion Paper 72: Review of Australian Privacy Law (**DP 72**).

In general, PIAC believes that the Privacy Act and related laws do not provide an effective framework for the protection of privacy in Australia. These laws have been fundamentally flawed since their inception, and recent technological and sociological developments have exacerbated their deficiencies. There is a pressing need for a major overhaul of the privacy framework in Australia.

In the time available, PIAC has been unable to develop a response to all of the recommendations in DP 72. This submission addresses Parts A, B, C, D, E, F and I of DP 72.

PIAC's General Comments on DP 72

PIAC notes the comprehensive nature of DP 72 and commends the ALRC on its work in this area. In general, PIAC believes that the ALRC has produced a model for reform of privacy law that will greatly simplify the complex and confusing framework that currently exists.

PIAC did not provide a response to Review of Privacy – Issues Paper 31 (**IP 31**).[4] Therefore, in this response to DP 72 PIAC has attempted to provide as much detail as possible to explain its position in relation to the various proposals and questions.

There are three general concerns that PIAC wishes to highlight at the outset of this submission.

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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, 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 (2007).

4 Australian Law Reform Commission, Review of Privacy, IP 31 (2006)

Firstly, PIAC is concerned about the numerous proposals in DP 72 for matters to be the subject of guidance, or further guidance, from the Office of the Privacy Commissioner (**OPC**). While PIAC accepts that there is a need for the Privacy Act not to be overly prescriptive and for some of the detail about particular provisions to be fleshed out in guidelines, it is PIAC's view that the ALRC has tended to use the OPC Guidance option as the 'too hard basket'. In PIAC's submission, it would be preferable that complex issues be dealt with and resolved as part of this Inquiry, rather than hived off to the OPC to be dealt with at some time in the future. PIAC also notes that OPC guidelines are not legally binding and that this may mean that significant reforms will not be given the force of law. Finally, PIAC notes that whether the OPC actually does draft guidance will inevitably depend on whether or not it is adequately resourced to do so.

Secondly, while acknowledging that the ALRC is constrained by its Terms of Reference, PIAC is somewhat disappointed that DP 72 fails to come to grips with the essential meaning of the term 'privacy'. PIAC accepts that privacy is a 'notoriously elastic concept'[5], and that it has 'protean capacity to be all things to all lawyers'.[6] However, PIAC agrees with Bruyer[7] that there is a need to find a 'common denominator' for privacy issues and that failure to do so will only perpetuate the piecemeal, haphazard approach that has characterised privacy regulation in Australia to date. PIAC notes that the New Zealand Law Reform Commission (**NZLRC**) is taking a different approach to privacy reform:

> In stage 1 of its review, therefore the New Zealand Law Commission will at least try to get at the heard of what 'privacy' stands for conceptually. Underlying this effort is the view that it is not helpful to start analysing the characteristics of features of 'privacy' without first coming to some view on what 'privacy' might be. It is acknowledged that approaching it in this way gives rise to difficulties of its own.[8]

In PIAC's view, the approach of the NZLRC is to be preferred to that of the ALRC, as it seeks to pare privacy back to basics and rebuild it, rather than to simply build on an existing, flawed model.

Finally, there are a number of aspects of the Discussion Paper that give rise to the need to consider the balance of the public interest in historic, social or medical research and privacy protections. In PIAC's view, this tension remains an important one to consider fully and resolve. In particular, the issue arises in respect of records retention/destruction and records relating to deceased persons.

Privacy as a Human Right

The right to privacy is recognised as a fundamental human right in the Universal Declaration of Human Rights (**UDHR**), the International Covenant on Civil and Political Rights (**ICCPR**) and numerous other international instruments and treaties.[9] It is worthy of note that Australia was a strong advocate of the

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5 Anita Allen, Uneasy Access: privacy for Women in a Free Society (1988) 16.

6 T Gerety, 'Redefining Privacy' (1977) Harv CR-CLL Rev 233 at 234.

7 R Bruyer, 'Privacy: A Review and Critique of the Literature' (2006) 43 Alberta Law Review 533 at 576

8 Mark Hickford, The New Zealand Law Commission and the Review of Privacy, Speech notes for Presentation to the 27th Asia Pacific Privacy Authorities' Forum, Cairns, 23 June 2007, para 16.

9 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

UDHR and has ratified relevant conventions requiring States Parties to protect the right to privacy. Privacy has been described as 'one of the most important human rights issues of the modern age'.[10]

Article 17 of ICCPR provides:

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

In recent years, the right to privacy has been specifically enshrined in the human rights legislation of the Australian Capital Territory and Victoria. Section 13 of the Charter of Human Rights and Responsibilities Act 2006 (Vic) and 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 draft Human Rights Bill 2007 (WA) is in similar terms.

However, as yet there is no broadly based human rights charter at the Federal level, and therefore no human rights framework or context within which the right to privacy can be asserted and interpreted consistently. PIAC regards it as absolutely fundamental that the ALRC's proposed reforms to privacy regulation in Australia be backed up by a legislatively entrenched human rights charter at the Federal level that specifically recognises an enforceable right to privacy. States and territories that have not yet enacted human rights legislation should do so, and such legislation should also recognise an enforceable right to privacy.

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

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

Part A – Introduction

Chapter 1. Introduction to the Inquiry

Proposal 1-1 The Office of the Privacy Commissioner should, either on its own motion or where approached in appropriate cases, encourage and assist agencies and organisations, in conjunction with Indigenous and other ethnic groups in Australia, to create publicly available protocols that adequately respond to the particular privacy needs of these groups.

PIAC supports the position that the ALRC has taken that the Privacy Act should not be amended to provide direct protection to particular identified groups in the community.

Privacy is a fundamental human right, based on protecting dignity and autonomy, which are individual, rather than group characteristics.[12] If this right was extended to particular groups (such as Indigenous or ethnic groups) there is a danger that the privacy interests of the group as a whole would be protected at the expense of individual interests. This runs counter to the notion of individual protection that underpins privacy regulation both nationally and internationally.

Extending the right to privacy to Indigenous or ethnic groups may also pave the way to a similar extension to corporate entities, a position that PIAC strongly opposes.[13]

Finally, from a practical perspective, it would be extremely difficult to determine which groups deserve additional privacy protection, and which do not.

However, PIAC is aware through its Indigenous Justice Program work that issues of secrecy and privacy for Indigenous communities are not well understood.[14] These issues—characterised as cultural rights—include the rights of Indigenous communities to maintain secrecy of Indigenous knowledge and other cultural practices, protection of sacred sites, control of and access to recordings of cultural customs and expressions and protection of sacred knowledge.

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12 The Privacy Act explicitly confers protection on 'individuals': Privacy Act 1988 (Cth Pt III, Div 1. The term 'individual' is defined in section 6(1) as meaning 'a natural person'. The Preamble to the Act refers to 'human rights' and to Australia's obligations at international law 'to give effect to the right of persons not to be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence' and to protect 'privacy and individual liberties'.

13 Public Interest Advocacy Centre, 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 (2007) 20.

14 In March 1998, the (then) Privacy Commissioner, Moria Scollay, acknowledged that the protections of the Act were not necessarily being fully enjoyed by Aboriginal and Torres Strait Islander people in the Northern Territory, and that Indigenous people's right to privacy was not always being addressed within the relevant cultural context: Privacy Commissioner, Minding our own business – Privacy Protocol for Commonwealth agencies in the Northern Territory handling personal information of Aboriginal and Torres Strait Islander people (1998) 1 <www.privacy.gov.au/publications/HRC_PRIVACY_PUBLICATION.word_file.p6_4_79.49.doc> at 21 December 2007

PIAC supports the development of protocols to respond to the particular needs of Indigenous groups (and other ethnic groups) as necessary to reflect and respect cultural rights and the need to keep some elements of culture confidential within the group. These protocols would provide a valuable practical guide to issues in the handling of culturally sensitive information of these groups and would also encourage collectors of data to consult and negotiate with members of these groups before handling information that is culturally sensitive.

However, PIAC is concerned that the only privacy protocol that appears to have been developed by the OPC in relation to Indigenous groups is now almost ten years old and predates amendments to the Privacy Act that extended the coverage of the Act to the private sector.[15] It is very unlikely that this protocol can be said to 'adequately respond to the particular privacy needs of this group'.

PIAC submits that Proposal 1-1 should include a positive obligation on the OPC to consult with the National Indigenous Council and the Aboriginal and Torres Strait Islander Social Justice Commissioner and with relevant Indigenous groups to review and update the existing protocol. Further dialogue by OPC with Indigenous communities about privacy issues is timely, given the recent Federal Government intervention in the Northern Territory and the increase in privacy intrusive measures that has accompanied this. It is also consistent with the draft Reconciliation Action Plan, referred to on the OPC's website, which refers to a number of key Reconciliation Result Areas, including 'establishing dialogue with Indigenous stakeholders on privacy issues' and 'developing guidance materials for agencies and organisations on protecting and respecting the privacy of Indigenous Australians'.[16]

PIAC submits that the following be added to Proposal 1-1:

> As a first step in this process, the Office of the Privacy Commissioner should, in consultation with the National Indigenous Council and the Aboriginal and Torres Strait Islander Social Justice Commissioner and relevant Indigenous groups, review and update the existing protocol: 'Minding our Own Business: Privacy Protocol for Commonwealth Agencies in the Northern Territory handling personal information of Aboriginal and Torres Strait Islander people.

Chapter 2:. Privacy Regulation in Australia

There are no proposals or questions in this chapter and PIAC has nothing to add.

Chapter 3. The Privacy Act 1988

Proposal 3-1 The Privacy Act should provide that the Governor-General may make regulations that modify the operation of the proposed Unified Privacy Principles (UPPs) to impose different or more specific requirements in particular contexts, including

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15 Privacy Commissioner, Minding our own business – Privacy Protocol for Commonwealth agencies in the Northern Territory handling personal information of Aboriginal and Torres Strait Islander people', Human Rights and Equal Opportunity Commission (1998) <http://www.privacy.gov.au/publications/HRC_PRIVACY_PUBLICATION.pdf_file.p6_4_79.49.pdf> at 14 December 2007.

16 Office of the Privacy Commissioner The Operation of the Privacy Act - Annual Report 1 July2006- 30 June 2007, (2007) 77.

imposing more or less stringent requirements on agencies and organisations than are provided in the UPPs.

PIAC understands that ALRC proposes that provisions dealing with credit reporting and handling of health information be promulgated as regulations under the Privacy Act, rather than appearing as provisions in the Act, as they currently are: Proposal 50-1 and Chapter 56.

This means that large chunks of provisions that are currently in the Act will, instead be in regulations. This has the benefit of simplifying and streamlining the Act, which is extremely long and detailed in its current form.

It may be appropriate for the operation of the proposed UPPs to be modified in relation to credit reporting and handling of health information. These appear to be areas where it may be necessary to modify the UPPs to achieve appropriate balance between the public interest in protecting the privacy of individuals with other public interests, such as allowing important public health research to be undertaken.

However, the wording of the Proposal 3-1 is very broad, and leaves it open to the Governor-General to make regulations modifying the operation of the UPPs in areas other than credit reporting and health information; for example, in the area of direct marketing. Of particular concern is the fact that the proposal contemplates that the regulations may impose 'less stringent requirements' on agencies and organisations than in the UPPs.

PIAC is concerned that such an approach may lead to a gradual erosion of privacy protection through subordinate legislation as has happened in New South Wales. In recent years, the NSW Government has gradually watered down the Privacy and Personal Information Protection Act 1998 (NSW) through successive regulations and other statutory instruments, sometimes without consulting the Privacy Commissioner.[17] As a result, privacy protection has been said to have become a 'moveable feast, but moving in one direction – away from the highest standards of privacy protection'.[18]

Regulations can be promulgated relatively easily, and with very little opportunity for public scrutiny or debate. Therefore, they should not be used to take away rights.

Proposal 3-2 The Privacy Act should be amended to achieve greater logical consistency, simplicity and clarity. For example, the IPPs and the NPPs should be consolidated into the Unified Privacy Principles (UPPs), the exemptions should be clarified and grouped together in a separate part of the Act and the Act should be restructured and renumbered.

PIAC strongly supports Proposal 3-2. The Act is well overdue for a complete overhaul. In its current form, it lacks coherence, and is overly complex and confusing. Many of PIAC's clients have complained that they have been unable to understand their rights from their own reading of the Act and have therefore been

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

18 Anna Johnston 'Reviewing the NSW Privacy Act: Exemptions and Inadequacies' [2004] Privacy Law and Policy Reporter 35 at 38.

put in the position of being forced to seek legal advice and representation. This is inappropriate in a jurisdiction that encourages self-representation.

PIAC is concerned but not surprised by reports to the ALRC that some agencies and organisations are being overly cautious or incorrect in the way that they apply the Act.[19] Simplification and clarification of the Act would greatly reduce confusion about the application of the Act, and make it more difficult for agencies and organisations to rely on 'because of the Privacy Act' as an excuse for refusing to provide access to personal information or undertake business transactions in situations where it should lawfully be provided. In PIAC's own experience as an organisation, this excuse has been used to prevent the organisation from concluding banking transactions and clarifying delays or problems with service delivery from private businesses.

Proposal 3-3 If the Privacy Act is amended to incorporate a cause of action for invasion of privacy, the name of the Act should remain the same. If the Act is not amended in this way, however, the Privacy Act should be renamed the Privacy and Personal Information Act.

If the Privacy Act is amended to incorporate a cause of action for invasion of privacy—Proposal 5-1—the name of the Act should remain unchanged. This would be in keeping with the broader focus of the Act on aspects of privacy other than information privacy (such as territorial privacy and privacy of communications).

However, if the Privacy Act is not amended to incorporate a cause of action for invasion of privacy, the name of the Act should be changed to a name that more accurately reflects the focus of the legislation on information privacy. To continue to call it the 'Privacy Act' would be misleading and would perpetuate public misconceptions that there is a general right to privacy in Australia.

PIAC does not support the proposal that the Act should be renamed the 'Privacy and Personal Information Act' as this suggests that the legislation is about personal information generally, when it is actually about the protection of such information.[20] PIAC does agree, however, that it is important to retain the term 'privacy' in the title of the Act, as some of the functions of the Privacy Commissioner go beyond data protection.[21] The use of this term also helps to maintain a rights-based context for the legislation.

In PIAC's view, a preferable name for the Act would be the 'Personal Information Privacy Protection Act'.

PIAC notes that, in respect of the possible renaming of the Privacy Act, the ALRC does not support the option that the Act should be renamed the Australian Privacy Act.

PIAC sees some benefit in renaming the Act the 'Australian Privacy Act'. This would differentiate it from privacy legislation in other jurisdictions. The use of the word 'Australian' suggests that privacy is seen as an important value to Australians generally and would emphasise the importance of the Act. PIAC

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19 Australian Law Reform Commission, Reviewing Australia's Privacy Laws - Is Privacy Passe? (2006) 5.

20 Many other jurisdictions include the term 'protection' in the title of their privacy legislation. See, for example, Privacy and Personal Information Protection Act 1998 (NSW), Personal Information Protection Act 2004 (Tas), Data Protection Act 1998 (United Kingdom), Personal Information Protection and Electronic Documents Act 2000 (Canada).

21 See Privacy Act 1988 (Cth) s 27(1)(b),(c),(e),(m) and (r).

acknowledges, however that this would involve a break with tradition, in that the word 'Australian' is usually only included in the title of federal legislation where it forms part of the name of the organisations established by the legislation.

Proposal 3-: The Privacy Act should be amended to include an objects clause. The objects of the Act should be to:

(a) implement Australia's obligations at international law in relation to privacy;

(b) promote the protection of individual privacy;

(c) recognise that the right to privacy is not absolute and to provide a framework within which to balance the public interest in protecting the privacy of individuals with other public interests;

(d) establish a cause of action to protect the interests that individuals have in the personal sphere free from the interference of others;

(e) promote the responsible and transparent handling of personal information by agencies and organisations;

(f) facilitate the growth and development of electronic commerce, nationally and internationally, while ensuring respect of the right to privacy; and

(g) provide the basis for nationally consistent regulation of privacy.

PIAC strongly supports the inclusion in the Privacy Act of an objects clause that clearly sets out the purpose and aims of the legislation. This would aid statutory interpretation in circumstances where there is uncertainty and ambiguity about particular provisions in the Act and would also assist community understanding. The inclusion of an objects clause is consistent with the general objective of simplifying and clarifying the Act—Proposal 3-2—and would also bring the Privacy Act into line with other human rights legislation at the federal level.[22]

At the moment, there is inadequate guidance about the application of the Act. Section 29 essentially provides guidance to the Privacy Commissioner, rather than to other stakeholders.

PIAC has some concern about the paragraph (c) of the proposed objects clause, namely the reference to a 'framework within which to balance the public interest in protecting the privacy of individuals with other public interests'. PIAC recognises that the right to 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 national security). Nonetheless privacy is a fundamental human right that has been recognised as such in key international instruments such as the Universal Declaration of Human Rights[23] and the International

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22 The Disability Discrimination Act 1992 (Cth) contains an objects clause in section 3. See also the Sex Discrimination Act 1984 (Cth) s 3, and the Age Discrimination Act 2004 (Cth) s 3.

23 United Nations Universal Declaration of Human Rights, GA Res 217A(III), UN Doc A/Res/810 (1948), Art 12.

Covenant on Civil and Political Rights.[24] However, paragraph (c) seeks to reduce it in status to an interest (albeit a 'public interest) that can be readily traded off against other public interests. In PIAC's view, this makes the right to privacy very fragile. It is not difficult to imagine it giving way to business and security interests as circumstances dictate. PIAC submits that paragraph (c) of the proposed objects clause should be reworded as follows:

> (c) recognise that the right to privacy is not absolute and to provide a framework within which to balance the right to privacy against <u>other human rights and freedoms</u>.

PIAC categorically rejects the inclusion of paragraph (f) in the objects clause. It is inappropriate to import into what is essentially human rights legislation an objective to facilitate the growth and development of electronic commerce. Facilitation of the growth and development of electronic commerce is likely to be a consequence of objective (e): 'promotion of the responsible and transparent handling of personal information by agencies and organisations'. However, it should not be seen as objective in itself. In PIAC's view, the major objective of the Privacy Act should remain primarily about protection of a fundamental human right: privacy.

Proposal 3-5

(a) The Privacy Act should define 'personal information' as 'information or an opinion, whether true or not, and whether recorded in a material form or not, about an identified or reasonably identifiable individual'.

(b) The Explanatory Memorandum of the amending legislation should make clear that an individual is 'reasonably identifiable' when the individual can be identified from information in the possession of an agency or organisation or from that information and other information the agency or organisation has the capacity to access or is likely to access.

(c) The Office of the Privacy Commissioner should provide guidance on the meaning of 'identified or reasonably identifiable'.

In relation to Proposal 3-5(a), PIAC agrees that the current definition of 'personal information' in section 6(1) of the Act is inadequate. Not only is the definition cumbersome and difficult to understand, it is also unclear as to how it applies in the context of new technologies, such as mobile phone numbers and 'generic' e-mail addresses that do not clearly identify an individual.

The ALRC's proposed new definition of 'personal information' in Proposal 3-5 has the advantage of being simpler and deletes wording that is no longer necessary, eg, 'including information or an opinion forming part of a database'. However, PIAC is unable to see why the definition needs to refer to 'information, <u>or an opinion</u>' (emphasis added). Other definitions of 'personal information' and 'personal data' make no reference to opinion. For example the OECD Guidelines and the Council of Europe Convention define 'personal data' as 'any information relating to an identified or identifiable individual'. In PIAC's submission, the inclusion of the word 'opinion' has the potential to make the definition too wide.

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[24] International Covenant on Civil and Political Rights, 16 December 1966 [1980] ATS 23, (entered into force generally on 23 March 1976), Art 17.

PIAC is also concerned that the definition hinges around the concept of identification; that is, the information or opinion must be about 'an identified or reasonably identifiable individual'. In PIAC's view, 'identity' is a difficult concept to use in the current cyberspace era. Traditional concepts of identity—such as name and address—are no longer appropriate in 'on-line' lives. Increasingly, individuals are able to be tracked and monitored through e-mail addresses, internet protocol (**IP**) addresses and internet banking passwords, even though they may not be able to be 'identified' by name, or physical location.

According to a European research report:

> A definition of personal data based on undefined and indefinable notion of identity and the pedant concept of anonymity is ambiguous and not directly workable. From the practical point of view, it would be better to refer to biographical data, identifiers linked to individuals or to terminal (indeed objects), and points of contact.'[25]

There is a need to move away from the concept of identification in defining personal information and to look instead at whether the information enables interactions with an individual on a personalised basis. This is a much more practical and measurable test than whether someone is 'identifiable or reasonably identifiable'.

In relation to Proposal 3-5(b), PIAC reiterates the concerns raised above about the use of the concept of 'identification' in defining 'personal information'. If the ALRC definition of 'personal information' is adopted, however, PIAC does not feel that the Explanatory Memorandum is the appropriate vehicle for spelling out a key component of the definition, ie, the meaning of 'reasonably identifiable'. In PIAC's submission, it would be preferable that this information be provided in the Act or regulations. The Explanatory Memorandum, although a valuable aid for statutory interpretation, is not likely to be available or accessible to consumers, agencies and organisations who are dealing with privacy issues on a daily basis. Further, most people do not understand the relevance of explanatory memoranda to statutory interpretation. In PIAC's submission, it is not appropriate to use an obscure interpretive tool for such an important element of the Act.

PIAC also recommends that the Act or regulations provide specific examples of situations where an individual can be identified from 'other information the agency or organisation has the capacity to access or is likely to access', eg, information that enables tracking or monitoring of an individual's activities and/or communication patterns, e-mail or IP addresses and information stored with an identifier code rather than with a name.

In relation to Proposal 3-5(c), it is, in PIAC's view, preferable that guidance on the meaning of 'identified or reasonably identifiable' be provided in the Act or regulations, rather than in OPC guidelines. The definition of 'personal information' is central to the Privacy Act as it determines whether or not the privacy principles apply. Therefore, it is crucial that the definition be clear and workable, and readily ascertainable by consumers, organisations and agencies. It is not appropriate that key components of the definition be relegated to OPC to flesh out in guidelines.

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[25] Report on the Application of Data Protection Principles to the worldwide telecommunications networks: Information self-determination in the internet era; thoughts on Convention No. 108 for the purposes of the future work of the Consultative Committee (T-PD), Council of Europe Strasburg, 13/12/2004, 33.

Guidelines are not legally binding, and are simply the Privacy Commissioner's view of how the Act should be interpreted. They are largely speculative, and indeed, the Federal Court has specifically commented of OPC Guidelines to the NPPs that 'such publications cannot control the interpretation of an Act of Parliament'.[26] In addition, whether or not OPC provides guidance on the meaning of 'identified or reasonably identifiable' will depend very much on whether OPC is adequately resourced to do this. Over two years ago, following its review of the private sector provisions of the Privacy Act, OPC undertook to provide guidance on the meaning of 'personal information'.[27] This is yet to happen.

PIAC notes that the Senate Legal and Constitutional References Committee recommended that consideration be given to extending the definition of 'personal information' to include information that enables an individual not only to be identified, but also contacted.[28] PIAC supports the Senate Committee's recommendation. The right to be left alone is an important component of the right to privacy and should be reflected in the definition of 'personal information'. Any qualifications to this right could be dealt with elsewhere in the Act, eg, through exemptions and exceptions.

Proposal 3-6 The definition of 'sensitive information' in the Privacy Act should be amended to include (a) biometric information collected for the purpose of automated biometric authentication or identification; and (b) biometric template information.

PIAC strongly endorses Proposal 3-6.

Biometric technology involves the storage and use of unique personal information to verify the identity of an individual. These unique identifiers are based on personal attributes such as fingerprints, DNA, iris, facial features, hand geometry, voice, and body odour.

Biometric information is highly personal and it is appropriate that it be given the high level of protection that is accorded to other sensitive information under the Act. Like other forms of sensitive information, it can provide the basis for unjustified discrimination and therefore warrants different treatment to other forms of personal information. Further, the inappropriate use or disclosure of this information can result in its use to create false identities. Such actions have significant impacts on the person whose biometric data has been compromised.

Although there is a privacy code dealing with the use of biometric technology, only a small number of organisations have elected to be bound by this Code.[29] It is therefore appropriate that the Privacy Act regulate the manner in which biometric information should be treated.

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26 Australian Communications and Media Authority v Clarity1 Pty Ltd [2006] FCA 410 (13 April 2006) at [75].

27 Office of the Privacy Commissioner, Getting in on the Act – The Review of the Private Sector Provisions of the Privacy Act 1988 (2005) 19

28 Senate Legal and Constitutional References Committee The Real Big Brother: Inquiry into the Privacy Act 1988 (2005) [7.13].

29 Biometrics Institute Privacy Code, Biometrics Institute Ltd (2006) <http://www.biometricsinstitute.org/displaycommon.cfm?an=1&subarticlenbr=8%20>, viewed at 21 December 2007. The Code was developed by the Biometrics Institute in consultation with OPC. To date, only five organisations have elected to be bound by the Code: Biometrics Institute Privacy Code Public Register, Biometrics Institute Ltd, <http://www.biometricsinstitute.org/displaycommon.cfm?an=1&subarticlenbr=80> at 21 December 2007.

Proposal 3-7 The definition of 'sensitive information' in the Privacy Act should be amended to refer to 'sexual orientation and practices' rather than 'sexual preferences and practices'.

PIAC supports Proposal 3-7. The term 'sexual orientation' reflects modern usage[30], and is consistent with language used in recent federal legislation[31], and with state and territory human rights and anti-discrimination legislation.[32]

Financial Information

PIAC notes the ALRC's view, at paragraph 3.168 'that financial information should not be included in the definition of sensitive information in the Privacy Act'.

PIAC disagrees with the ALRC's view on the basis that it is at odds with community attitudes and expectations about the treatment of financial information. Most surveys show that financial information is considered by individuals to be highly personal and highly sensitive. For example, community attitudes research undertaken by the OPC in 2001 and 2004 indicates that financial information was the top response for individuals when rating what types of information they were most reluctant to provide to organisations.[33]

In certain circumstances, financial information may reveal sensitive personal information about a person. For example, a bank statement or a tax return might contain details of donations made to a political party, thus revealing information about a person's political beliefs. Or a bank statement might show payment of subscriptions to a special interest magazine, which may, in turn, reveal information about a person's sexual orientation and practices, or their religious beliefs or affiliations. It might also show a history of payments to a private psychiatric clinic, thus revealing information about their health.

Thus, like other forms of sensitive information, financial information has the potential to give rise to unjustified discrimination against individuals and minority groups as well as other potential damage. PIAC urges the ALRC to rethink its position on the inclusion of 'financial information' in the definition of 'sensitive information'.

Proposal 3-8 The definition of 'record' in the Privacy Act should be amended in part to include (a) a document; and (b) information stored in electronic and other forms.

PIAC supports Proposal 3-8. This proposed amended definition is broad enough to encompass evolving technology, but also specific enough to make it clear to agencies, organisations and consumers what is, and what is not a record for the purposes of the Act.

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30 In recent years, the use of the term 'sexual orientation' has been preferred by media style guides to the term 'sexual preference' as the latter carries the contested implication that sexuality is a matter of choice. See, for example, Gay and Lesbian Alliance against Defamation, Media Reference Guide, <http://www.glaad.org/media/guide/style.php> at 21 December 2007.

31 Private Health Insurance Act 2007 (Cth) s 55.5.

32 Equal Opportunity Act 1995 (Vic) s 6; Charter of Human Rights and Responsibilities Act 2006 (Vic) s 3; Equal Opportunity Act 1984 (WA) s 35O; Anti-Discrimination Act 1998 (Tas) s 16; Human Rights Act 2004 (ACT) s 8.

33 Office of the Privacy Commissioner, 2001 Research into Community Attitudes towards Privacy in Australia (2001); 2004 Research into Community Attitudes Towards Privacy in Australia (2004) <http://www.privacy.gov.au/business/research/index.html> at 21 December 2007.

However, the ALRC should make it clearer in Proposal 3.7 that this definition is intended to be inclusive, rather than exhaustive. It should also make it clear that the definition of 'document' in the Acts Interpretation Act 1901 (Cth) should be incorporated by reference. PIAC proposes the following wording:

> Proposal 3-8: The definition of 'record' in the Privacy Act should be amended as follows:
> "Record" includes:
> (a) a document (as defined in the Acts Interpretation Act 1901); and
> (b) information stored in electronic and other forms.

Photographs

PIAC notes the ALRC's view, set out at paragraph 3.185:

> … that photographs or other pictorial representations should be covered by the term 'record' in the Privacy Act and that they should not be limited by the phrase 'of a person'.

but submits that a more cautious approach be adopted. While photographs that tend to identify an individual may require privacy protection, PIAC sees no reason for photographs at large to be protected. PIAC suggests that ALRC give further consideration to the implications of this view, particularly its potential to have a day-to day activities of individuals.

Proposal 3-9 The definition of 'generally available publication' in the Privacy Act should be amended to clarify that a publication is 'generally available' whether or not a fee is charged for access to the publication.

PIAC agrees with Proposal 3-9. Once information is in the public domain, it is difficult to argue that it requires privacy protection.

Proposal 3-10 The personal information of deceased individuals held by agencies should continue to be regulated by the Freedom of Information Act 1982 (Cth) and the Archives Act 1983 (Cth).

Generally, PIAC supports Proposal 3-10. However, PIAC notes that the Freedom of Information Act 1982 (Cth) does not provide for amendment or annotation of personal information by a third party on behalf of the deceased individual. This is a matter of concern, given that the use of inaccurate or out-of-date personal information has been flagged as a problem by respondents to the ALRC Inquiry.[34]

Proposal 3-11 The Privacy Act should be amended to include a new Part dealing with the personal information of individuals who have been dead for 30 years or less where the information is held by an organisation.

PIAC has some concerns with Proposal 3-11. PIAC accepts that the personal information of deceased persons should be subject to some privacy protections where it impacts on, or potentially impacts on, the privacy of third parties. However, PIAC is unable to see why deceased persons themselves require privacy protection for their personal information. Privacy is an individual right, and when the individual is no longer in existence, the rationale for privacy protection no longer exists. This is consistent with the approach taken in defamation law.

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[34] Australian Law Reform Commission, Review of Australian Privacy Law, Discussion Paper 72 (2007) [3.217]

PIAC accepts that there is a need to clarify the obligations that organisations have in relation to the personal information of deceased people. However, PIAC is concerned that the detailed principles proposed are needlessly confusing and that they may place unjustified constraints on legitimate social and historical research, which is often in the public interest.

PIAC submits that the words 'including the deceased person' should be deleted from Proposal 13-11(a) (Use and Disclosure). Once a person is dead, they cannot be harmed in any way by use or disclosure. The principle should be limited to where disclosure would disclose personal information either directly or by implication about a third person.

In relation to Proposal 13-11(b) (Access), PIAC accepts that in some circumstances third parties may have legitimate grounds to seek access to the personal information of a deceased person and that organisations should be required to consider providing this access. For example, members of the Aboriginal 'Stolen Generation' need to be able to obtain information about deceased relatives in order to find their identity and re-establish family and community links.[35] However, PIAC submits that the words 'including the deceased individual' should be deleted for the same reasons outlined in the comments above in response to Proposal 13-11(a).

PIAC supports Proposal 13-11(c) (Data Quality) but it is difficult to see how an organisation could check accuracy, completeness and currency of the information without, in some circumstances, having to contact next-of-kin and/or personal representatives. Further, the information will inevitably lose currency after a person's death.

PIAC strongly opposes with Proposal 13-11(d) (Data Security) to the extent that it seeks to require organisations to take reasonable steps to destroy or render personal information of deceased individuals non-identifiable if it is no longer needed to any purpose permitted under the proposed UPPs. The wording, 'if it is no longer needed for any purpose permitted under the proposed UPPs' is too vague and may be difficult to apply in practice. A provision allowing destruction of the personal information of a deceased person could be used as an excuse to destroy information that is damaging to the organisation, for example, in situations where the organisation may have a potential legal liability to the estate of the deceased. Once the information has been destroyed, it will be too late for representatives of the deceased to seek to challenge the actions of the organisation. Similarly, the records may be of historical importance and should not be destroyed simply because the person is deceased.

Over the last few years, PIAC's work with Indigenous communities has led to the investigation of claims by clients who were denied access to wages, allowances and pensions held on trust by the Aborigines Welfare Board (**AWB**) and subsequently the NSW Government. This Project, known as 'The Stolen Wages Project', relies, in respect of claims by descendants particularly, on personal information of deceased individuals. Although the Project mainly involves information held by government agencies rather than organisations, it provides a good example of the need to protect information of deceased individuals from destruction. Further, the destruction of or inability to locate the records of private organisations that were involved in the custody and employment of Indigenous people has created and remains a significant barrier to some claimants.

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35 Similarly, claimants in respect of Aboriginal 'stolen wages' may need to access information about deceased forebears in order to fully investigate the claim.

PIAC also concerned that the proposed provision also has the potential to impact adversely on the capacity to effectively carry out social and medical research. PIAC favours a formulation that prevents destruction of the personal information of deceased persons for a specified period of time.
PIAC supports 13-11(d) to the extent that it seems to require organisations to take reasonable steps to ensure that the personal information of deceased individuals they disclose to a person pursuant to contract, or otherwise in connection with the provision of a service, is protected from being used or disclosed by that person otherwise than in accordance with the Privacy Act. However, PIAC submits that there needs to be more specific guidance on what would constitute 'reasonable steps'. For example, would it be sufficient for the organisation to provide contractors and/or service providers with a copy of the organisation's privacy policy, or would something more be required?

Proposal 3-12 The proposed provisions dealing with the use and disclosure of personal information of deceased individuals should make it clear that it is reasonable for an organisation to disclose genetic information to a genetic relative of a deceased individual where the organisation reasonably believes that the use or disclosure is necessary to lessen or prevent a serious threat to the life, health of safety of a genetic relative. Any use or disclosure of genetic information of deceased individuals should be in accordance with rules issued by the Privacy Commissioner.

PIAC acknowledges that genetic information of deceased persons may have implications for living individuals. However, PIAC would like to see some provision for consultation with the next-of-kin of the deceased person, or their legal personal representative. It is possible that prior to their death, the deceased person may have expressed a wish not to have the information disclosed, and if so, their wishes should be seriously considered.

PIAC is concerned that the requirement that genetic information be disclosed to 'a genetic relative of a deceased individual' may be problematic in circumstances where a person who may or may not be a genetic relative is seeking genetic information to determine whether or not they are in fact a genetic relative. PIAC suggests that the wording 'presumed genetic relative' be used instead.

PIAC is concerned that, alone, the Privacy Commissioner may not have the necessary expertise to make rules about the use or disclosure of genetic information. PIAC submits that the National Health and Medical Research Council (NHMRC) should also have some input into the formulation of such rules.

Proposal 3-13: Breach of the proposed provisions relating to the personal information of a deceased individual should be considered an interference with privacy under the Privacy Act. The following individuals should have standing to lodge a complaint with the Privacy Commissioner alleging an interference with the privacy of a deceased individual:

(a) in relation to the alleged breach of the use and disclosure, data quality or data security provisions, the deceased individual's parent, child or sibling who is at least 18 years old, spouse, de facto partner or legal personal representative; and

(b) in relation to the alleged breach of the access provision, any person who has made a request for access to the personal information of a deceased individual.

Only third parties whose privacy has been impacted by the manner in which the personal information of the deceased person has been dealt with should have standing to bring a complaint. Standing should be determined by a person's relationship to the personal information in question, not by their relationship to the deceased person.

Chapter 4. Achieving National Consistency

General Views

PIAC supports a move towards greater national consistency in privacy regulation. The inconsistency that currently exists between the Federal regime and the regimes that apply in states and territories has generated much uncertainty and confusion about privacy rights and responsibilities for agencies, organisations, individuals and regulators.

However, it is vital that greater national consistency is not achieved at the cost of weaker privacy protection.

Proposal 4-1 The Privacy Act should be amended to provide that the Act is intended to apply to the exclusion of state and territory laws dealing specifically with the handling of personal information by organisations. In particular, the following laws of states and territories would be excluded to the extent that they apply to organisations:

(a) Health Records and Information Privacy Act 2002 (NSW)

(b) Health Records Act 2001 (Vic)

(c) Health Records (Privacy and Access) Act 1997 (ACT)

(d) any other laws prescribed in the regulations.

PIAC agrees in principle with the approach set out in Proposal 4-1. State borders are often irrelevant for the operations of the private sector and it makes sense for privacy in this sector to be entirely regulated at the Federal level. There is currently a great deal of inconsistency not only between the Federal and state/territory privacy regimes, but also between the privacy regimes of different states and territories. This creates both confusion and inefficiency.

However, PIAC does not support removal of state-based privacy legislation in relation to the private sector if this was to result in a lowering of standards of privacy protection in that sector. It is important that the strongest elements of the state-formulated schemes not be lost in a drive towards national consistency.

Proposal 4-2 States and territories with information privacy legislation that purports to apply to private sector organisations should amend that legislation so that it is no longer expressed to apply to private sector organisations.

PIAC supports Proposal 4-2, subject to the reservations expressed above about the need to guard against a weakening of privacy protection standards in the private sector.

In particular the removal of state-based privacy legislation for the private sector should not create any gaps in privacy protection. For example, it will be important to ensure that private sector organisations that are currently covered by state or territory privacy laws are in fact going to be covered by the Federal privacy law.

Proposal 4-3 The Privacy Act should not apply to the exclusion of a law of a state or territory so far as the law deals with any 'non-excluded matters' set out in the legislation. The Australian Government, in consultation with state and territory governments should develop a list of 'non-excluded matters', for example matters such as:

(a) reporting for child protection purposes;

(b) reporting for public health purposes; and

(c) the handling of personal information by state and territory government contractors.

It is in the public interest that state legislation regulating the handling of personal information by the private sector should be preserved where it relates to reporting for child protection purposes and reporting for public health purposes. Such legislation usually cuts across both the public and private sectors, and it is important that policy implementation and reporting obligations be consistent in both.

PIAC strongly agrees that state legislation should include clear provisions regulating the handling of personal information by organisations contracting with state and territory government agencies—see Proposal 4.4—and that this legislation should also be preserved.

PIAC is concerned that a process of consultation between the Australian Government and the state and territory governments in order to develop a list of 'non-excluded matters' will be cumbersome, time consuming and likely to indefinitely delay implementation of the proposed amendments to the Privacy Act. PIAC sees no reason why the amendments can't simply be drafted in a way that lists broad categories of laws that have already been identified in submissions to the ALRC as appropriate 'non-excluded matters'. As well as laws dealing with reporting for child protection purposes and public health purposes,

the list of 'non-excluded matters' should include laws regulating adoption, infertility treatment and disability service provision.[36]

Proposal 4-4 The states and territories should enact legislation that regulates the handling of personal information in that state or territory's public sector that:

(a) applies the proposed Unified Privacy Principles and the proposed Privacy (Health Information) Regulations as in force under the Privacy Act from time to time; and

(b) include at a minimum:

(i) relevant definitions used in the Privacy Act (including 'personal information', 'sensitive information' and 'health information)';

(ii) provisions allowing public interest determinations and temporary public interest determinations;

(iii) provisions relating to state and territory incorporated bodies (including statutory corporations);

(iv) provisions relating to state and territory government contracts; and

(iv) provisions relating to data breach notification.

The legislation should also provide for the resolution of complaints by state and territory privacy regulators and agencies with responsibility for privacy regulation in that state or territory's public sector.

PIAC supports Proposal 4-4. The enactment in state and territory legislation of the UPPs and certain key features of the Federal privacy regime such as the data breach notification provisions will enhance consistency not only between Federal, and state and territory privacy regimes, but also between the public and private sectors.

Consistency would be further enhanced if state and territory privacy legislation also included the definition of 'record' that is used in the Privacy Act.

PIAC strongly supports Proposal 4-4(iii) as this should ensure coverage for State Owned Corporations, which until now appear to have fallen into an unregulated gap between Federal and state privacy laws.[37] PIAC also strongly endorses Proposal 4-4(iv) as this will clarify the position of private sector contractors engaged by state or territory governments and ensure that they are no longer able to escape the reach of privacy laws.

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36 See, for example, Government of Victoria, Submission PR 288, 26 April 2007, Attachment A.

37 State Owned Corporations (SOCs) are legal entities created by the State Owned Corporations Act 1989 (NSW) and listed in Schedule 5 to that Act. They include the New South Wales Lotteries Corporation, Landcom and Rail Corporation New South Wales. These entities fall outside the definition of 'public sector agency' in the PPIP Act. Nor do they fall within the ambit of the private sector provisions of the Privacy Act unless they are prescribed by regulation.

PIAC agrees with the continuation of regulators at the state and territory level to resolve complaints. This will help ensure that complaint handling is efficient, accessible and accountable.

Proposal 4-5 The Australian Government should initiate a review in five years to consider whether the proposed Commonwealth-state co-operative scheme has been effective in achieving national consistency. This review should consider whether it would be more effective for the Australian Parliament to exercise its legislative power in relation to information privacy in the state and territory sectors.

PIAC agrees that a review in five years time would be useful to determine how well privacy laws are working generally and whether there is a need for further amendment. However, PIAC does not believe that such review should consider whether it would be more effective for the Australian Parliament to exercise its legislative power in relation to information privacy in the state and territory sectors.

It would be possible for the Australian Parliament to legislate to cover the field in relation to the handling of personal information by states and territories by relying, for example, on the external affairs power as a means of giving effect to ICCPR. However, in PIAC's view such legislation would be fraught with difficulty.

Citizens in each jurisdiction need to have a regulator that they can access to handle complaints and to provide advice and information about privacy laws in that jurisdiction. Equally important is the advocacy and monitoring role of the state and territory Privacy Commissioners. Without such advocacy there is a risk that privacy with 'sink without trace'. According to former NSW Shadow Attorney General, Andrew Tink MP, 'Privacy needs advocacy; it must be pushed, it must be pressed; it needs a champion'.[38]

In PIAC's view, it is important that a privacy presence is retained at the state, territory and Federal levels so that privacy does not sink without trace in NSW, or anywhere else. Having several privacy regulators ensures peer review and promotes high standards in the performance of their functions.

[38] Andrew Tink MP in opposing the Privacy and Personal Information Protection Amendment Bill 2003 (NSW), which sought to abolish the role of the NSW Privacy Commissioner by transferring his functions to the NSW Ombudsman: NSW Parliamentary Debates, Legislative Assembly, 29 October 2003 (Andrew Tink).

Proposal 4-6 To promote and maintain uniformity, the Standing Committee of Attorneys General (SCAG) should adopt an intergovernmental agreement which provides that any proposed changes to the proposed:

(a) Unified Privacy Principles must be approved by SCAG; and

(b) Privacy (Health Information) Regulations must be approved by SCAG, in consultation with the Australian Health Ministers' Advisory Council (AHMAC).

This agreement should provide for a procedure whereby the party proposing a change requiring approval must give notice in writing to the other parties to the agreement, and the proposed amendment must be considered and approved by SCAG before being implemented.

PIAC does not consider that Proposal 4-6 is a workable arrangement. SCAG processes can be extremely time consuming[39], and have been criticised by privacy advocates for lack of transparency and failure to provide opportunities for effective consultation.[40] Privacy legislation would be but one of many issues on SCAG's agenda, and there is a danger that delay and failure to agree on certain crucial issues could hinder responsiveness to technological issues as they emerge.

SCAG has been criticised for being unsuccessful in tackling other privacy issues[41], and one commentator has gone so far as to describe referral to SCAG of an ALRC report on a single uniform law on unfair publication to SCAG as 'the kiss of death for that report.[42]

In PIAC's view, a preferable model would be a permanent standing body of privacy commissioners from all jurisdictions.

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39 For example, it took almost six years for SCAG to reach agreement that there should be a referral of powers to the Commonwealth to overcome jurisdictional disputes that had arisen between the Family Court and various state and territory courts over the right to deal with matters that involved the custody and guardianship of ex-nuptial children: New South Wales, Parliamentary Debates, Legislative Assembly, 11 September 1996, 4052 (The Hon AG Corbett).

40 Australian Privacy Foundation, Workplace Privacy: Options for Reform, Submission to the Standing Committee of Attorneys-General (2007) 1.

41 Australian Privacy Foundation, Review of Privacy, Answers to questions in ALRC Issues Paper 31, Submission to the Australian Law Reform Commission, January 2007, 3.

42 According to former Federal Attorney-General, the Hon Phillip Ruddock MP, this statement was made by Justice Michael Kirby in 1985, when he was President of the Australian Law Reform Commission: Phillip Ruddock MP, Australian Legal Education Forum: Standing Committee of Attorneys-General, Australian Government Attorney-General's Department, 2 July 2004 <http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Speeches_2004_Speeches_2_July_2004_-_Speech_-_Australian_Legal_Education_Forum> at 21 December 2007.

Proposal 4-7 The Standing Committee of Attorneys General (SCAG) should be assisted by an expert advisory committee to:

(a) provide advice in relation to the amendment of the proposed Unified Privacy Principles and the proposed Privacy (Health Information) Regulations;

(b) address issues related to national consistency such as the scrutiny of federal, state and territory bills that may adversely impact on national consistency on the regulation of personal information; and

(c) address issues related to the enforcement of privacy laws, including information sharing between privacy regulators and cooperative arrangements for enforcement.

Appointments to the expert advisory committee should ensure a balanced and broad-based range of expertise, experience and perspectives relevant to the regulation of personal information. The appointments process should involve consultation with state and territory governments, business, privacy and consumer advocates and other stakeholders.

If the SCAG approach set out in Proposal 4-6 is adopted, PIAC agrees that it would be useful for SCAG to have the assistance of an expert advisory committee as set out in Proposal 4-7. However, it would be important to ensure that there is a strong consumer voice on any such committee.

Chapter 5. Protection of a Right to Personal Privacy

Proposal 5-1 The Privacy Act should be amended to provide for a statutory cause of action for invasion of privacy. The Act should contain a non-exhaustive list of the types of invasion that fall within the cause of action. For example, an invasion of privacy may occur where:

(a) there has been an interference with an individual's home or family life;

(b) an individual has been subjected to unauthorised surveillance;

(c) an individual's correspondence or private, written, oral or electronic communication has been interfered with, misused or disclosed; or

(d) sensitive facts relating to an individual's private life have been disclosed.

PIAC strongly supports the proposal that there should be a general cause of action for invasion of privacy in Australia. PIAC has recently made a detailed submission about this matter to the New South Wales Law Reform Commission.[43]

[43] Public Interest Advocacy Centre, 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 (2007).

It is unacceptable that people who suffer flagrant invasions of their territorial or bodily privacy or the privacy of their communications have virtually no recourse under existing privacy laws. A general cause of action would bring Australia into line 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 ICCPR.

PIAC agrees that a general cause of action should be contained in statute. It should not be left to incremental development at common law, as this would be too time-consuming, and would not provide the same degree of certainty and clarity about rights and responsibilities as legislation.

In PIAC's view, the most appropriate statute to contain the cause of action is the Privacy Act. If individual states and territories enact their own legislation dealing with invasions of privacy, there is a danger that levels of protection will be uneven across Australia. This would perpetuate the random, haphazard development that has been a feature of data protection laws and would create confusion and uncertainty for the many organisations and agencies that operate across state borders.

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 this type of action would become the sole province of celebrities and those wealthy enough to afford to pay for legal representation and to run the risk of incurring an adverse costs order if they are unsuccessful. The Privacy Act should provide that parties to the cause of action should generally bear their own costs and that costs orders should only be made in exceptional circumstances. There should also be provision for representative proceedings and class actions to be taken, so as to reduce the burden on individual complainants.

PIAC agrees with the concept of a non-exhaustive list of the types of conduct that might amount to invasions of privacy. Again, this provides certainty and clarity by giving context to the cause of action and the circumstances in which it might arise. It also allows for appropriate development of the law to meet changing social and technological circumstances.

So far as the proposed types of conduct are concerned, PIAC makes the following comments:

PIAC is concerned that the wording of Proposal 5-1(a) may be too narrow. Sometimes conduct that is invasive of privacy takes place outside the realm of a person's home or family life. For example, the defendant in Grosse v Purvis[44] persistently loitered at or near the plaintiff's places of work and recreation, as well as near her place of residence. He also made repeated offensive phone calls to her while she was at work. In our view, any act that intrudes upon the privacy or seclusion of the plaintiff should come within the cause of action, regardless of where it takes place and whether or not it involves family in some way. PIAC believes that the ICCPR would support a broader formulation, as it refers to 'arbitrary or unlawful interference with privacy, family, home or correspondence' (emphasis added).

In PIAC's submission, Proposal 5-1(b) should be extended to also make it clear that there is an invasion of privacy if a person discloses information, documentation or material obtained by unauthorised surveillance. In many cases, it is not just the act of surveillance itself that leads to an invasion of privacy, but also the subsequent use that is made of material gained during surveillance (for example, publication of

44 [2003] QDC 151

the material by the media). PIAC notes that the proposed privacy legislation in Ireland includes disclosure of surveillance material in a list of types of conduct that amount to violation of privacy.[45]

PIAC supports Proposal 5-1(c).

PIAC submits that Proposal 5-1(d) should be broadened to take account of physical privacy intrusions such as unreasonable search and seizure, or media harassment. These intrusions may not necessarily result in disclosure of sensitive facts relating to an individual's private life, but they may nonetheless amount to arbitrary or unlawful interference with privacy.

Proposal 5-2 The Privacy Act should provide that, in determining what is considered 'private' for the purpose of establishing liability under the proposed statutory cause of action, a plaintiff must show that in all the circumstances:

(a) there is a reasonable expectation of privacy; and

(b) the act complained of is sufficiently serious to cause substantial offence to a person of ordinary sensibilities.

PIAC considers that the reasonable expectation test in Proposal 5-2(a) is fluid enough to take account of factors such as the nature and incidence of the act, conduct or publication, the age and circumstances of the plaintiff, the relationship between the parties and the place where the alleged invasion of privacy took place.

PIAC also agrees that Proposal 5-2(b) is workable as the second limb of the test. The more rigorous test of 'highly offensive to a reasonable person' has been criticised as being confusing, and suggesting a stricter test of what should be considered private than a reasonable expectation of privacy.[46] In PIAC's view it is important not to set the bar too high when applying an objective test of seriousness.

Proposal 5-3 The Privacy Act should provide that:

(a) only natural persons should be allowed to bring an action under the Privacy Act for invasion of privacy;

(b) the action is actionable without proof of damage; and

(c) the action is restricted to intentional or reckless acts on the part of the defendant.

PIAC strongly supports Proposal 5-3(a). Privacy is a human right, concerned with dignity and the value of the lives of human beings. It is inappropriate that the right to privacy extend to corporations or groups (see PIAC's comments above in relation to ALRC DP 72, Chapter 1).

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

45 Privacy Bill 2006 (Ireland) cl 3(2)(b)

46 Campbell v MGN Ltd [2004] 2 AC 457 [22]

> much of what is protected, where rights or privacy, as distinct from rights of property, are acknowledged, in human dignity. This may be incongruous when applied to a corporation.[47]

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.[48]

PIAC strongly supports Proposal 5-3(b). An invasion of privacy should be actionable *per se*. 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 stop someone doing something that they would normally do. For example, if they have been subjected to unauthorised surveillance, they may feel reluctant to leave their home. In this type of situation, it is difficult to point to any provable damage in a legal sense.

PIAC notes that the privacy statutes of British Columbia, Saskatchewan, Manitoba, Newfoundland and Labrador all provide that the tort of violation of privacy is actionable *per se*[49], as does the Privacy Bill currently before the Irish Parliament.[50] PIAC supports this approach. Privacy is a fundamental human right; it should not be necessary to prove damage arising from its breach.

In relation to Proposal 5-3(c), PIAC agrees that a person or entity should be liable for acts that deliberately or wilfully invade a plaintiff's privacy. PIAC also agrees that liability should extend to reckless acts, where, for example, the defendant deliberately ignored a risk of harmful consequences arising from an action, or failed to give any thought as to whether there was any such risk.

In PIAC's view, the action should also extend to negligent acts on the part of the defendant. In some cases, negligent acts can lead to extremely serious breaches of privacy, where the impact can be just as serious for the plaintiff as that of a deliberate or reckless breach. For example, in one matter, PIAC acted for a client whose medical records were exposed on the internet by an employee of the hospital that she had been attending for treatment. Although the employee's act was negligent, rather than deliberate or reckless, the impact on the client was catastrophic because of her vulnerability and the sensitivity of the information disclosed, which included information about treatment for a psychiatric illness.

Many systemic breaches of privacy may be due to negligence, rather than to reckless or intentional acts. For example, an organisation with inadequate security procedures might unwittingly release personal information about a number of its clients. It is inappropriate that victims of these breaches of privacy

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

48 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.

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

50 Privacy Bill 2006 (Ireland) cl 2(2).

should have no legal recourse. Restricting liability to reckless or intentional acts may also discourage organisations from taking steps to ensure that their privacy management systems are adequate, and may encourage indifference to privacy protection.

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

Proposal 5-4 The Office of the Privacy Commissioner should provide information to the public concerning the proposed statutory cause of action for invasion of privacy.

PIAC supports Proposal 5-4, but recommends that this be an ongoing process, rather than just a 'one-off'. This is likely to be a complex area, and different circumstances will arise over time that will require consideration.

Proposal 5-5 The range of defences to the proposed statutory cause of action for invasion of privacy provided for in the Privacy Act should be listed exhaustively. The defences should include that the:

(a) act or conduct was incidental to the exercise of a lawful right of defence of person or property;

(b) act or conduct was required or specifically authorised under by or under law;

(c) information disclosed was a matter of public interest or was a fair comment on a matter of public interest; or

(d) disclosure of the information was, under the law of defamation, privileged.

Generally, PIAC supports the inclusion of the defences set out in Proposal 5-5, and also the ALRC's recommendation that the issue of consent be dealt with in the context of one of the essential elements of the cause of action, rather than as a defence.[51]

In relation to Proposal 5-5(c), PIAC notes that 'what interests the public is not necessarily in the public interest'[52], and recommends that there be some guidance given in the Act about when information disclosed will be a 'matter of public interest' or 'fair comment on a matter of public interest'. A 'legitimate public concern' test of the kind applied in the New Zealand case of Hosking v Runting[53] would be of some assistance. In particular, it would be useful to have a provision in the Act that specifically stated that the publication of material merely for the purpose of arousing prurient or morbid curiosity is not to be regarded as being a publication a topic of public interest.

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51 Australian Law Reform Commission Discussion Paper 72: Review of Privacy Law (2007) [5.82]

52 Ash v McKennitt [2007] 3 WLR 194 [66]; see also Jameel v Wall Street Journal [2006] 2 AC 465, [147]

53 Hosking v Runting [2005] 1 NZLR 1 [133] – [134]. This test considers whether there is a 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.

Question 5-1 In addition to the defences listed in Proposal 5-5, are there any other defences that should apply to the proposed statutory cause of action for invasion of privacy?

See the comments on consent in the response above to Proposal 5-5. PIAC is not aware of any other defences that should apply to the proposed statutory cause of action for invasion of privacy.

Proposal 5-6 To address an invasion of privacy, the court should be empowered by the Privacy Act to choose the remedy that is most appropriate in all the circumstances, free from the jurisdictional constraints that may apply to get that remedy in the general law. For example, the court should be empowered to grant any one or more of the following:

(a) damages, including aggravated damages, but not exemplary damages;

(b) an account of profits;

(c) an injunction;

(d) an order requiring the defendant to apologise to the plaintiff;

(e) a correction order;

(f) an order for the delivery up and destruction of material;

(g) a declaration; and

(h) other remedies or orders that the court thinks appropriate in the circumstances.

PIAC supports the ALRC'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 opposes Proposal 5-6(a) on the basis that there may be circumstances where an invasion of privacy may be of such a malicious or high-handed manner that it warrants an award of exemplary damages. The threat of exemplary damages may also serve as a deterrent, thereby giving some 'teeth' to the legislation. PIAC notes that the Irish Privacy Bill proposes allowing an award of exemplary damages.[54]

PIAC strongly supports the inclusion of non-monetary remedies (such as declarations and apologies) in the list of remedies. In many situations, these will provide the most appropriate redress for an invasion of privacy. However, in order to ensure that justice is actually achieved for those whose complaints are proven, it will be important to have provision in the Privacy Act for the enforcement of these 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 setting out the terms of the order.[55] There is also provision in section 108(7) of the Anti-Discrimination Act 1977 (NSW) for the Administrative

54 Privacy Bill 2006 (Ireland) cl 8(4).

55 Anti-Discrimination Act 1977 (NSW) s 114.

Decisions Tribunal (**ADT**) to order the respondent to pay 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. In PIAC's view, similar provisions in the Privacy Act would greatly strengthen a cause of action for invasion of privacy.

PIAC recommends inclusion of 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 Anti-Discrimination Act 1977 (NSW) for the ADT to order the respondent to a vilification complaint to develop and implement a program or policy aimed at eliminating unlawful discrimination. PIAC submits that a similar provision in any legislation dealing with invasion of privacy would help to prevent further breaches of privacy and would also assist in bringing about cultural change in organisations that fail to take their privacy obligations seriously.

Proposal 5-7 Until such time as the states and territories enact uniform legislation, the state and territory public sectors should be subject to the proposed statutory cause of action for invasion of privacy in the Privacy Act.

PIAC supports Proposal 5-7.

Part B – Developing Technology

Chapter 6. Overview – Impact of Developing Technology on Privacy

There are no proposals or questions in this chapter, and PIAC has nothing further to add.

Chapter 7. Accommodating Developing Technology in a Regulatory Framework

Proposal 7-1 The Privacy Act should be technologically neutral.

PIAC supports the proposition that the Privacy Act should be technologically neutral, but notes that this does not mean that the Privacy Act should not also be 'technologically aware'. In order to ensure that the Privacy Act is responsive to new technologies as they develop, it will be important for the OPC to play a much more proactive role than it has to date in researching and monitoring technological developments and their implications for privacy.

In general, the Unified Privacy Principles (**UPPs**) should remain high-level and technologically neutral. However, certain technologies such as Radio Frequency Identification (RFID) may require stronger, more specific regulation. This is best accommodated through standards, additional legislation or binding Codes.

Proposal 7-2 The Privacy Act should be amended to empower the Minister responsible for the Privacy Act, in consultation with the Office of the Privacy Commissioner, to determine which privacy and security standards for relevant technologies should be mandated by legislative instrument.

PIAC supports Proposal 7-2. However, the Privacy Act should also make it clear who actually has the power to mandate the standards by legislative instrument (presumably also the Minister), the process to be followed for this to happen, the mechanisms for ensuring monitoring and reporting of compliance with the standards, and the consequences of failure to comply with a standard.

PIAC strongly endorses the introduction of appropriate privacy standards into legislation, as this will promote both consistency and compliance. It will also engage agencies and organisations in actively addressing privacy issues at the design stage.

Proposal 7-3 In exercising its research and monitoring functions, the Office of the Privacy Commissioner should consider technologies that can be deployed in a privacy enhancing way by individuals, agencies and organisations.

PIAC supports Proposal 7-3, but submits that the proposal should be expressed more strongly, ie, the Privacy Commissioner 'must consider' rather than simply 'should consider'. If the Privacy Act is to be technologically neutral, it is vital that the regulator—the OPC—play a proactive role in monitoring privacy enhancing technologies.

Proposal 7-4 The Office of the Privacy Commissioner should educate individuals, agencies and organisations about specific privacy enhancing technologies and the privacy enhancing ways in which technologies can be deployed.

PIAC supports Proposal 7-4, but again submits that this proposal should be expressed more strongly: 'must educate' instead of 'should educate'.

Proposal 7-5 The Office of the Privacy Commissioner should provide guidance in relation to technologies that impact on privacy (including, for example, guidance about RFID or data collecting software such as 'cookies'). Where appropriate, the guidance should incorporate relevant local and international standards. The guidance should address:

(a) when the use of a certain technology to collect personal information is not done by 'fair means' and is done 'in an unreasonably intrusive way';

(b) when the use of a certain technology will require, under the proposed 'Specific Notification' principle, agencies and organisations to notify individuals at or before the time of collection of personal information;

(c) when agencies and organisations should notify individuals of certain features of technology used to collect information (for example, how to remove an RFID tag contained in clothing; or error rates of biometrics systems);

(d) the type of information that an agency or organisation should make available to an individual when it is not practicable to provide access to information held in an intelligible form (for example, what biometric information is held about an individual when the information is held as an algorithm); and

(e) when it may be appropriate for an agency or organisation to provide a human review of a decision made by automated means.

PIAC supports Proposal 7-5.

Proposal 7-6 The Office of the Privacy Commissioner should provide guidance to organisations on the implications of data-matching.

PIAC agrees that the provision of guidance by the OPC to organisations on the implications of data matching would be useful, as there are voluntary data-matching guidelines in place for agencies, but nothing for organisations.

However, consideration should be given to making the OPC data-matching guidelines mandatory. Although the ALRC concludes that agencies are complying with the existing voluntary data-matching guidelines, there is no evidence to suggest that this will continue to be the case, or that organisations will also comply when similar guidelines has been developed for them. Given the serious implications of data-matching, including its potential to be used to profile individuals, both agencies and organisations should be subject to mandatory data-matching rules.

Chapter 8. Individuals, the Internet and Generally Available Publications

Question 8-1 Should the online content regulation scheme set out in the Broadcasting Services Act 1992 (Cth), and in particular the ability to issue take down notices, be expanded beyond the National Classification Code and decisions of the Classification Board to cover a wider range of content that may constitute an invasion of an individual's privacy? If so, what criteria should be used to determine when a take down notice should be issued? What is the appropriate body to deal with a complaint and issue the take down notice?

PIAC supports expansion of the take-down notice scheme beyond the existing definitions of prohibited content, to content that may constitute an invasion of an individual's privacy. Sites such as Facebook and YouTube are frequently used to post photographs, video and commentary without the knowledge or consent of individuals concerned, often depicting these individuals in embarrassing or humiliating situations. For example, earlier this year, a film clip was posted on YouTube showing a teacher in a Melbourne school who had been secretly filmed while being ridiculed and threatened by students.[56]

If ALRC Proposal 5-1 (dealing with a statutory cause of action) is adopted, it would be possible for an individual who is concerned about unauthorised online publication of his or her personal information (including images) to commence legal proceedings for invasion of privacy. However, a take-down notice would offer an effective alternative remedy to people who might not be able to afford legal representation, or who want to have the material removed from the internet immediately.

The existing system, which relies on the Classification Board to determine whether content is 'prohibited content', may not be appropriate for determining whether conduct amounts to a breach of privacy. A better system may be for the Australian Communications and Media Authority (**ACMA**) to refer complaints to the Federal or state/territory Privacy Commissioners (or their delegates) who would then determine whether the material is an invasion of privacy (or potentially an invasion of privacy) using a test similar to that set out in ALRC Proposal 5-2, ie, was there a reasonable expectation of privacy in the circumstances, and is the content sufficiently serious to cause substantial offence to a person of ordinary sensibilities?

It will be important that any take-down notice system operates efficiently so that privacy intrusive content can be forcibly removed from the internet before it has had an opportunity to do too much damage. Notices should be able to be issued by more than one body or entity and should cover removal of privacy invasive material from archived sites, as well as current sites.

Time frames for removal of material should be short, for example, as soon as practicable, or no later than 6:00 pm the next business day. Penalties should apply to internet content hosts that fail to comply with a take-down notice within the specified time frame. For serious or repeat offenders, the penalty should be indefinite suspension of the service.

PIAC notes that there are jurisdictional limitations to the effectiveness of a take-down notice system. For example, ACMA would not be able to issue a take-down notice in relation to internet content hosted

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56 Mary Padadakis, 'YouTube, MySpace airing videos of abused teachers', Sunday Herald Sun, (Sydney) 1 July 2007, <http://www.news.com.au/story/0,23599,21997-2,00.html> at 19 December 2007.

outside Australia. PIAC also notes the enormous practical difficulties of attempting to remove material from the internet when it has been copied onto other websites. It is therefore important that any take-down notice scheme is supplemented with education—ideally aimed primarily at primary and secondary school students—about the impact of the internet on privacy. Hopefully this will lead to a reduction in the amount of privacy invasive material that is published on the internet in the first place.

Proposal 8-1 The Office of the Privacy Commissioner should provide guidance that relates to generally available publications in an electronic form. This guidance should:

(a) apply whether or not the agency or organisation is required by law to make the personal information publicly available;

(b) set out certain factors that agencies or organisations should consider before publishing personal information in an electronic form (for example, whether it is in the public interest to publish on a publicly accessible website personal information about an identified or reasonably identifiable individual); and

(c) set out the requirements in the proposed Unified Privacy Principles with which agencies and organisations need to comply when collecting personal information from generally available publications for inclusion in a record or another generally available publication (for example, when a reasonable person would expect to be notified of the fact and circumstances of collection).

In PIAC's view, OPC guidance in this area would not be sufficient. Stronger regulation is needed. Publicly available websites can often contain personal information about an individual that, in isolation, may seem innocuous, but when combined with other pieces of personal information from other sources, can be used to build up a detailed profile of that individual that can be used for the purposes of identity theft. The perception of how individual privacy is treated in generally available publications is also important. If individuals feel that their privacy is not going to be adequately protected, they may choose not to engage in public life, for example, by not enrolling to vote in order to avoid having their details on the electoral roll. This would have an adverse impact on the democratic process.

Legislation setting up public registers should be reviewed to ensure that there are appropriate restrictions on the type and extent of personal information published on the internet, and that any restrictions on the use and disclosure of personal information contained on the register are clearly set out. Ideally, such legislation should limit information that is made available electronically to that which is necessary to promote the purpose of the public record. Alternatively, the legislation could require the removal of unnecessary personal information from documents before they are published electronically.

Chapter 9. Identity Theft

There are no proposals or questions in this chapter, and PIAC has nothing further to add.

Part C – Interaction, Inconsistency and Fragmentation

Chapter 10. Overview

There are no proposals or questions in this chapter, and PIAC has nothing further to add.

Chapter 11. The Costs of Inconsistency and Fragmentation

Proposal 11-1 The Office of the Privacy Commissioner should provide further guidance to agencies and organisations on privacy requirements affecting information sharing.

PIAC supports Proposal 11-1.

It is to be hoped that many of the barriers to information sharing that currently exist will be reduced with the implementation of key ALRC proposals such as the introduction of Unified Privacy Principles (ALRC Proposal 15-2) and the redrafting of the Privacy Act to achieve greater logical consistency, simplicity and clarity (ALRC Proposal 3-2). However, in order to ensure that agencies and organisations fully understand the impact of these reforms on information sharing, it will be essential that they be provided with accurate and comprehensive guidance from the OPC.

Preparation of this guidance should be given priority by the OPC, as delay may result in the continuation of a 'chilling effect' on information sharing due to organisations and agencies not understanding their obligations under privacy laws.[57]

Proposal 11-2 Agencies that are required or authorised by legislation or a public interest determination to share personal information should develop and publish documentation that addresses the sharing of personal information: and where appropriate, publish other documents (including memoranda of understanding and ministerial agreements) relating to the sharing of personal information.

PIAC strongly supports Proposal 11-2. It is essential that there be maximum transparency about arrangements for the sharing of personal information.

Proposal 11-3 The Australian Government should convene an inter-agency working group of senior officers to identify circumstances where it would be appropriate to share or streamline the sharing of personal information among Australian Government agencies.

PIAC conditionally supports Proposal 11-3, subject to any working group also preferably including (or at minimum, consulting with) consumer groups and privacy advocates.

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57 See Australian Law Reform Commission, Review of Australian Privacy Law, Discussion Paper 72 (2007) [11.12]

Proposal 11-4 The Australian Government, in consultation with: state and territory governments, intelligence agencies, law enforcement agencies, and accountability bodies (including the Office of the Privacy Commissioner; the Inspector-General of Intelligence and Security; the Australian Commission for Law Enforcement Integrity; state and territory privacy commissioners and agencies with responsibility for privacy regulation, and federal, state and territory ombudsmen) should:

(a) develop and publish a framework relating to inter-jurisdictional sharing of personal information within Australia by intelligence and law enforcement agencies; and

(b) develop memoranda of understanding to ensure that accountability bodies can oversee inter-jurisdictional information sharing within Australia by law enforcement and intelligence agencies.

PIAC conditionally supports Proposal 11-4, subject to there being maximum transparency about the framework and the memoranda of understanding. PIAC also recommends that there be an effective mechanism to ensure consumer input in any consultative process.

Question 11-1 Are the definitions of 'contracted service provider' and 'State contract' under the Privacy Act adequate? For example, do they cover all the types of activities that organisations might perform on behalf of agencies?

The definitions of 'contracted service provider' and 'State contract' in the Privacy Act are adequate. However, the provisions dealing with contracted service providers and State contracts are not. It is unclear from the provisions whether contracted service providers are able to contract out of their privacy obligations. PIAC notes that section 6A(2) of the Privacy Act appears to be inconsistent with section 13A(1)(c).

A consumer who has sustained a breach of privacy should not have to trace his or her way back through a complex web of outsourced contractual arrangements to determine against whom an action should be brought. The provisions dealing with contracted service providers and State contracts should be amended to make it absolutely clear that organisations cannot contract out of their privacy obligations and responsibilities.

PIAC notes the effect of the contractor provisions in the Information Privacy Act 2000 (Vic), being that organisations cannot contract out of their privacy obligations under that Act. Although contracting out was permitted during a phase-in period when the Act first came into force[58], contractors must now ensure that their contractual provisions are in accordance with their legislative obligations under privacy legislation and any other relevant laws.[59] Similar provisions should be incorporated into the Privacy Act.

58 Information Privacy Act 2000 (Vic) ss 16(2) and 16(3).

59 Information Privacy Act 2000 (Vic) ss 16 and 17.

Chapter 12. Federal Information Laws

Proposal 12-1 The Australian Government and state and territory governments should ensure the consistency of definitions and key terms (for example, 'personal information', 'sensitive information' and 'health information') in federal, state and territory legislation that regulates handling of personal information.

PIAC strongly supports Proposal 12-1. Clear, consistent definitions of these key terms across Federal, state and territory legislation will reduce complexity and increase consistency.

Proposal 12-2 Section 4(1) of the Freedom of Information Act 1982 (Cth) should be amended to provide that a document is exempt if it:

(a) contains personal information, and the disclosure of that information would constitute a breach of the proposed 'Use and Disclosure' principle and disclosure would not, on balance, be in the public interest; or

(b) contains personal information of a deceased individual, and the disclosure of that information would constitute a breach of the proposed 'Use and Disclosure' principle (but where the principle would require consent the agency must consider whether the proposed disclosure would involve unreasonable disclosure of personal information about any individual, including the deceased individual) and the disclosure would not, on balance, be in the public interest.

PIAC conditionally supports Proposal 12-2, subject to the option of document disclosure where the personal information can be deleted. This will clarify the relationship between the Freedom of Information Act 1982 (Cth) (**the FOI Act**) and the Privacy Act and finally give effect to recommendations that the ALRC and the Administrative Review Council (ARC) made over ten years ago.[60] There needs to be clarification, however, about whether the exemption will still be subject to an exception that a person cannot be denied his or her own information[61], and what the position will be where such information cannot be separated from personal information about another person.[62]

In relation to Proposal 12-2(b), PIAC reiterates the concerns that it raised in relation to Proposal 3-11 above about there being a need for some provision for consultation with the deceased's next-of-kin or their legal personal representative. The amendment suggested in Proposal 12-2(b) appears to be at odds with section 27A of the FOI Act, which requires agencies to provide a deceased individual's legal personal representative with a reasonably opportunity to make submissions in relation to the matter.

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60 Australian Law Reform Commission and Administrative Review Council, Open Government: A Review of the Federal Freedom of Information Act 1982, ALRC 77 (1995), [10.7] and Rec 59.

61 See Freedom of Information Act 1982 (Cth) s 41(2).

62 See, for example, Re Forrest and Department of Social Security (1991) 23 ALD 131.

Proposal 12-3 'Personal information' should be defined in the Freedom of Information Act 1982 (Cth) as 'information or an opinion, whether true or not, and whether recorded in a material form or not, about an identified, or reasonably identifiable individual'.

PIAC agrees that there is a need for consistency between the definitions of personal information in the FOI Act and the Privacy Act. However, PIAC reiterates its concerns under proposal 3-5 in relation to the proposed definition of 'personal information'.

Proposal 12-4 The Freedom of Information Act 1982 (Cth) should be amended to require that the body that is primarily responsible for administration of the Act is to:

(a) develop and publish guidelines on the interpretation and application of section 41;

(b) consult with the Office of the Privacy Commissioner before issuing guidelines on the interpretation and application of section 41.

PIAC supports Proposal 12-4. PIAC understands that the relevant body would be the Federal Department of Prime Minister and Cabinet.[63]

Proposal 12-5 The Freedom of Information Act 1982 (Cth) should be amended to provide that disclosure of personal information in accordance with the Freedom of Information Act 1982 (Cth) is a disclosure that is required or authorised for the purposes of the proposed 'Use and Disclosure' principle under the Privacy Act.

PIAC supports Proposal 12-5. Implementation of Proposal 12-5 will clarify the interaction of the FOI Act with the Privacy Act, and give effect to an amendment that was proposed by the ALRC and the ARC in 1995.[64]

Proposal 12-6 The Privacy Act should be amended to provide a new Part dealing with access to, and correction of, personal information held by an agency.

PIAC supports Proposal 12-6. The rights to access and amend one's own personal information are fundamental privacy rights that are more appropriately dealt with under the Privacy Act than under the FOI Act. The overlap between the Privacy Act and the FOI Act in this area has been the source of much confusion and delay. If information is inaccurate, it should be able to be corrected as expeditiously as possible so that the person to whom the information relates is not prejudiced in any way. The creation of a new Part in the Privacy Act to deal with access to and correction of personal information and the repeal of corresponding provisions in the FOI Act should enable applications to be dealt with more efficiently.

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63 J Bajkowski, 'Rudd takes firm hold on privacy laws', Australian Financial Review, (Melbourne) 5 December 2007, 54.

64 Australian Law Reform Commission and Administrative Review Council, Open Government: A Review of the Federal Freedom of Information Act 1982 ALRC 77 (1995) [10.23].

Proposal 12-7 The Freedom of Information Act 1982 (Cth) should be amended to:

(a) provide that an individual's right to access or correct his or her own information is dealt with under the Privacy Act, and

(b) repeal Part V of the Act.

PIAC supports Proposal 12-7. See comments above in relation to Proposal 12-6.

Proposal 12-8 The proposed Part of the Privacy Act dealing with access to, and correction of, personal information held by an agency should provide that:

(a) if an agency holds personal information about an individual the agency must, if requested by the individual, provide the individual with access to the information, subject to a number of exceptions under the Part;

(b) where an individual is given access to personal information, the individual must be advised that he or she may request the correction of that information;

(c) where an agency is not required to provide the individual with access to personal information because of an exception, the agency must take reasonable steps to reach an appropriate compromise, involving the use of a mutually agreed intermediary, provided that the compromise would allow for sufficient access to meet the needs of both parties: and

(d) nothing in the Part is intended to prevent or discourage agencies from publishing or giving access to personal information, otherwise than as required by the Part, where they can do so properly or are required to do so by law.

PIAC supports Proposal 12-8. For the sake of consistency between the public and private sectors, the provisions implementing Proposal 12-8 should generally replicate UPP 9.

In relation to Proposal 12-8(c), however, PIAC is concerned that the wording 'provided that the compromise would allow sufficient access to meet the needs of both parties' may restrict the operation of the principle unnecessarily. See PIAC's comments below in relation to Proposal 26-2 regarding similar wording in the proposed Access and Correction Privacy Principle.

Question 12-1 What exceptions should apply to the general provision granting an individual the right to access his or her own personal information held by an agency? For example, should the exceptions mirror the provisions in Part IV of the Freedom of Information Act 1982 (Cth) or should another set of exceptions apply?

PIAC submits that any exceptions to the general provision granting an individual the right of access to his or her own personal information held by an agency should generally replicate those in proposed UPP 9.

Proposal 12-9 The proposed Part of the Privacy Act dealing with access to, and correction of, personal information held by an agency should provide that, if an agency holds personal information about an individual, the agency must:

(a) if requested by the individual, take such steps to correct (by way of making appropriate corrections, deletions or additions) the information as are, in the circumstances, reasonable to ensure that the information is, with reference to a purpose of collection permitted by the proposed Unified Privacy Principles accurate, complete, up-to-date, relevant and not misleading;

(b) where the agency has taken the steps outlined in (a) above, if requested to do so by the individual, and provided such notification as would be practicable in the circumstances, notify any other entities to whom the personal information has already been disclosed before correction.

The provisions should generally replicate UPP 9.

The agency's obligations to notify in Proposal 12-9(b) should not necessarily be triggered by a request from the individual. There may be circumstances where an individual may not be able to make such a request, for example, where they have a decision-making disability. Where this happens, the agency should still notify recipients about the correction as this will reduce the risk of the incorrect information being used or disclosed by recipients. See also PIAC's comments in relation to Proposal 26-4.

Proposal 12-10 The proposed Part of the Privacy Act dealing with access to, and correction of, personal information held by an agency should provide that where an agency decides not to correct the personal information of an individual, and the individual requests the agency to annotate the personal information with a statement by the individual claiming that the information is not accurate, complete, up-to-date, relevant, or is misleading, the agency must take reasonable steps to do so.

PIAC conditionally supports Proposal 12-10. For the sake of consistency with UPP 9, Proposal 12-10 should use the term 'associate with' rather than 'annotate'.

Proposal 12-11 The proposed Part of the Privacy Act dealing with access to and correction of, personal information held by an agency should set out a process for dealing with a request for access or correct personal information that addresses:

(a) the requirements for making an application for correction or annotation of personal information;

(b) time periods for processing a request to access or correct personal information;

(c) the transfer of a request to access or correct personal information to another agency in certain circumstances (for example, when a document is not in the possession of an agency but is, to the knowledge of that agency, in the possession of another agency);

(d) how personal information is to be made available to the individual (including by giving the individual a reasonable opportunity to inspect the records, or by providing a copy of the record, or by providing oral information about the contents of the record);

(e) how corrections are to be made (including by additions and deletions);

(f) the deletion of expected matter or irrelevant material;

(g) the persons authorised to make a decision on behalf of an agency in relation to a request to access or correct personal information;

(h) when a request for access to personal information may be refused by an agency (for example, when it would substantially and unreasonably divert the resources of the agency from its other operations, or in the case of a minister, would substantially and unreasonably interfere with the performance of the minister's functions); and

(i) the provision of reasons for a request to deny a request to access or correct personal information.

Generally PIAC supports Proposal 12-11.

However, in relation to Proposal 12-11(d), unless there is a very good reason to the contrary, individuals should always be given full access to the original record. Providing a copy of the record or oral information about the record should not generally be sufficient.

In relation to Proposal 12-11(h), agencies should not be able to claim resource diversion as a reason for denying access to requests for access to personal information. Nor should Ministers be able to claim that requests for access to personal information would substantially and unreasonably interfere with the performance of their functions.

Clear time frames should be set in relation to Proposal 12-11(i).

Proposal 12-12 The proposed Part of the Privacy Act dealing with access to, and correction of, personal information held by an agency should provide for:

(a) internal review by an agency of a decision made under the Part;

(b) review by the Administrative Appeals Tribunal of a decision made under the Part (including the power to make an order for compensation); and

(c) complaints to the Commonwealth Ombudsman.

PIAC supports Proposal 12-12 on the basis that these are appropriate avenues for review and complaints. However, the legislation should clearly specify whether pursuing one avenue of complaint necessarily rules out another.

PIAC strongly recommends that the Act specify time limits that agencies must adhere to in carrying out internal reviews. For many of PIAC's clients, the internal review process has been a frustrating and lengthy process, with agencies sometimes taking up to 12 months to carry out a review.

Proposal 12-13 The Office of the Privacy Commissioner should issue guidelines of access to, and correction of, records containing personal information held by an agency.

PIAC conditionally supports Proposal 12-13, subject to the general reservations expressed elsewhere in this response about OPC guidance.

Question 12-2 Should the Office of the Privacy Commissioner's complaint handling, investigative, and reporting functions be exempt under the Freedom of Information Act 1982 (Cth)?

No. In PIAC's view, there is no justification for the OPC to have a 'cover-all' exemption in relation to its complaint-handling, investigative and reporting functions. Such a provision could undermine public confidence in the transparency and accountability of the OPC. However, it should still be possible to apply on a case by case basis for exemptions of information or documents provided to or generated by OPC as part of its complaint-handling, investigative or reporting functions. PIAC notes that existing section 41(1) allows for this to happen where a document may unreasonably disclose personal information and that the proposed amended section 41(1) will allow it to happen where disclosure of the information would constitute a breach of the proposed 'Use and Disclosure' principle and disclosure would not, on balance, be in the public interest.[65]

Proposal 12-14 Part VIII of the Privacy Act (Obligations of confidence) should be repealed.

PIAC supports Proposal 12-14.

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65 See Australian Law Reform Commission, Discussion Paper 72, Review of Australian Privacy Law (2007) Proposal 21-2.

Chapter 13. Required or Authorised under Law

Question 13-1 Should the definition of a 'law' for the purposes of determining when an act or practice is required or specifically authorised by or under a law include:

(a) a common law or equitable duty;

(b) an order of a court or tribunal;

(c) documents that are given the force of law by an Act of Parliament (such as industrial awards); and

(d) statutory instruments such as a Local Environment Plan made under a planning law?

The High Court has held that in interpreting human rights legislation, any exemptions and other provisions that restrict rights should be construed narrowly.[66] PIAC would therefore not support a wide definition of the term 'law' for the purposes of determining whether an act or practice is required or specifically authorised by or under a law.

PIAC supports the proposal that the definition of 'law' should extend to documents referred to in Question 13-1(c). The definition of 'law' should only include 'an order of a court or tribunal—Question 13-1(b)—to the extent to which privacy issues were canvassed in the matter that was before the court or tribunal.

PIAC does not support an extension of the definition to the instruments listed in (d), as these are not subject to parliamentary scrutiny and may be developed by local government without any consideration of privacy issues. Nor does PIAC support the definition including 'a common law or equitable duty'—Question 13-1(a)—as this would create too much uncertainty.

Question 13-2 Should a list be compiled of laws that require or authorise acts or practices in relation to personal information that would otherwise be regulated by the Privacy Act? If so, should the list have the force of law? Should it be comprehensive or indicative? What body should be responsible for compiling and updating the list?

The compilation and maintenance of a comprehensive list of laws that require or authorise acts or practices that would otherwise be regulated by the Privacy Act would provide greater clarity for agencies, organisations and individuals about whether certain laws meet the criteria of the exception. Although compilation of this list would be a time-consuming process, it would not be impossible, given that there are a limited number of laws that authorise acts or practices in relation to personal information. Compiling the list will also provide a useful opportunity to review these laws to ensure that they are consistent with the proposed amendments to the Privacy Act. Such a list should be maintained on the OPC website, with a notation to the effect that it is intended to be a guide only and that agencies, organisations and individuals should also seek their own legal advice.

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66 X v Commonwealth (1999) 200 CLR 177 at 233 per Kirby J; Qantas Airways Limited v Christie (1998) 193 CLR 280 at 333 and footnotes 168-169, per Kirby J.

Ideally, the list should be promulgated in regulations [what is the rationale for this as it is simply a list of other things promulgated in regulations – adding this layer of regulation may add to confusion and complexity – need to discuss]. This would give it more force than it would have if it was just published on the OPC website. It would enable it to be updated more easily than if would be the case if it was contained in a schedule to the Act.

Proposal 13-1 If the exemption that applies to registered political parties and political acts and practices is not removed, the Commonwealth Electoral Act 1918 (Cth) should be amended to provide that prescribed individuals, authorities and organisations to whom the Australian Electoral Commission must give information in relation to the electoral roll and certified lists of voters must take reasonable steps to:

(a) protect the information from misuse and loss and from unauthorised access, modification or disclosure; and

(b) destroy or render the information non-identifiable if it is no longer needed for a permitted purpose.

PIAC strongly supports Proposal 13-1. Ideally, these provisions should also be backed up by penalties for breach.

PIAC's preference, however, is for the exemption for political parties and political acts and practices to be removed (see PIAC's response to Proposal 37-1 below).

Proposal 13-2 The Australian Electoral Commission and state and territory electoral commissions, in consultation with the Office of the Privacy Commissioner, should develop and publish protocols that address the collection, use, storage and destruction of personal information shared for the purpose of the continuous update of the electoral roll.

PIAC supports Proposal 13-2.

Proposal 13-3 The review of the Anti-Money Laundering and Counter Terrorism Financing Act 2006 (Cth), the regulations and the Anti-Money Laundering and Counter Terrorism Financing Rules under s 251 of the Act should consider, in particular, whether:

(a) reporting entities and designated agencies are appropriately handling personal information under the legislation;

(b) the number and range of transactions for which identification is required should be more limited than currently provided for under the legislation;

(c) it remains appropriate that reporting entities are required to retain information for seven years; and

(d) it is appropriate that reporting entities are able to use the electoral roll for the purpose of verification.

PIAC strongly supports Proposal 13-3, given the numerous privacy concerns that have been raised about this legislation.

Proposal 13-4 The Anti-Money Laundering and Counter Terrorism Financing Act 2006 (Cth) should be amended to provide that state and territory agencies that access personal information provided to the Australian Transaction Reports and Analysis Centre under the Act be regulated under the Privacy Act in relation to the handling of that personal information, except where they are covered by obligations under a state or territory law that are, overall, at least the equivalent of all the relevant obligations in the Privacy Act.

PIAC strongly supports Proposal 13-4.

Chapter 14. Interaction with State and Territory Laws

Proposal 14-1 The Privacy Act should be amended to provide that when an Australian Government agency is participating in an intergovernmental body or other arrangement involving state and territory agencies (for example a Ministerial Council), the Australian Government agency should ensure that a memorandum of understanding is in place so that the intergovernmental body and its members do not act, or engage in a practice, that would breach the Act.

PIAC supports Proposal 14-1.

Part D – The Privacy Principles

Chapter 15. Structural Reform of the Privacy Principles

Proposal 15-1 The privacy principles in the Privacy Act should be drafted to pursue, as much as practicable, the following objectives:

(a) the obligations in the privacy principles generally should be expressed as high level principles;

(b) the privacy principles should be simple, clear and easy to understand and apply; and

(c) the privacy principles should impose reasonable obligations on agencies and organisations.

In relation to Proposal 15-1(a), PIAC agrees that high-level principles allow for greater flexibility in a changing technological environment. However, there also needs to be adequate guidance about how such principles are to operate. PIAC is concerned that, to date, there has been insufficient guidance in some areas, and that such guidance, when it is available, tends to be in the form of non-binding guidelines and information sheets issued by the Privacy Commissioner. Ideally, guidance about the operation of the UPPs should be contained in the Act itself in the form of more prescriptive provisions. Alternatively, it should be set out in regulations or binding codes.

PIAC supports Proposal 15-1(b).

PIAC is very concerned by the wording of Proposal 15-1(c). The word 'reasonable' is open to many different interpretations. What is 'reasonable' from a business perspective may be very unreasonable from a consumer perspective. PIAC would prefer the following wording: 'the privacy principles should impose reasonable obligations on agencies and organisations that effectively protect the privacy interests of individuals' (emphasis added).

Proposal 15-2 The Privacy Act should be amended to consolidate the current Information Privacy Principles and National Privacy Principles into a single set of principles – the Unified Privacy Principles (UPPs) that would be generally available to agencies and organisations, subject to such exceptions as required.

PIAC strongly supports Proposal 15-2. It makes no sense to continue the artificial dichotomy that exists in privacy regulation between the public and private sectors. This dichotomy is historically based, and appears to have no sound basis in policy.

The OECD Guidelines on which the privacy principles are based apply to both the pubic and private sectors. Having a single set of principles would reduce confusion and help to achieve national consistency as well as making Australian privacy regulation more consistent with international regimes.

Proposal 15-3 The proposed UPPs should apply to information privacy except to the extent that:

(a) the Privacy Act or another piece of Commonwealth primary legislation imposes different or more specific requirements in a particular context; or

(b) subordinate legislation under the Privacy Act imposes different or more specific requirements in a particular context.

PIAC agrees that a 'one size fits all' approach is not appropriate for the proposed UPPs. In some areas, such as credit reporting, health research and treatment, and the telecommunications industry, general UPPs may not be appropriate, and there will be a need for more specific obligations to apply. There may also be a need in these areas to differentiate between the obligations that apply to organisations and to agencies.

However, PIAC is concerned that Proposal 15-3, as currently worded, could legitimate a progressive watering down of the UPPs through other Commonwealth legislation and subordinate legislation. PIAC reiterates its observations about the history of privacy protection in New South Wales and its concerns that such a pattern could be repeated at the Federal level (see PIAC's comments above in relation to Proposal 3-1). The imposition of different requirements in different contexts has the potential to undo the consistency that the ALRC is seeking to achieve and to erode the UPPs. The UPPs should only be replaced by more stringent requirements.

Proposal 15-4 The National Privacy Principles should provide the general template in drafting and structuring the proposed UPPs.

PIAC supports Proposal 15-4. While the Nation Privacy Principles (**NPPs**) certainly have room for improvement, they are more comprehensive than the Information Privacy Principles (**IPPs**) and much easier to understand. The ability of the NPPs to translate well to the public sector has already been demonstrated by the privacy statutes of Victoria, Tasmania and the Northern Territory.[67] Because organisations are already familiar with the NPPs, the cost to business of a transition to a UPP model incorporating the structure and features of the NPPs should be minimal.

Chapter 16. Consent

Proposal 16-1 The Office of the Privacy Commissioner should provide further guidance about what is required of agencies and organisations to obtain an individual's consent for the purposes of the Privacy Act. This guidance should (a) cover consent as it applies in various contexts; and (b) include advice on when it is and is not appropriate to use the mechanism of 'bundled consent'.

PIAC opposes Proposal 16-1. OPC has already provided guidance on the issue of consent.[68] Despite this, it is clear from submissions to this Inquiry that there is still much confusion about the issue, and that agencies and organisations appear to be relying on 'consent' in circumstances where they should not be doing so.

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67 See Information Privacy Act 2000 (Vic) sch 1; Personal Information Protection Act 2004 (Tas) sch 1; Information Act 2002 (NT) sch 2.

68 See Office of the Privacy Commissioner, Guidelines to the National Privacy Principles (2001) 38.

For example, it appears that 'bundled consent' is often sought as part of the terms and conditions of provision of a product or service, and that such products and services are being denied to people who do not provide such consent. In such circumstances, consent can hardly be said to be meaningful or given freely.

The concept of consent is pivotal to the operation of many of the privacy principles. For example, NPP 2.1(b) provides that an organisation may use or disclose personal information for a secondary purpose if the individual has consented to the use or disclosure. However, the current definition of 'consent' in the Privacy Act—as meaning 'express consent or implied consent'[69]—is of little assistance to parties attempting to understand and apply the principles.

Unless the issue of consent is clearly understood and consistently applied, the privacy principles stand on fragile foundations. There clearly needs to be greater clarity as to the meaning of consent in the Privacy Act. Rather than hiving off this problem to the OPC to deal with in yet more guidelines, the ALRC should recommend that the definition of 'consent' in the Privacy Act should be amended to set out with greater precision what factors need to be taken into account in obtaining a person's consent or determining whether or not consent has been given.

PIAC notes that recommendations have already been made by the OPC and the Senate Committee privacy inquiries to clarify the rules on consent. These could be used as a basis for formulating a definition of consent.

PIAC agrees that consent will inevitably depend on context and that what is required to obtain consent in one situation may be different to what is required in another situation. However, it is possible to distil some core elements of consent, and these should be enshrined in legislation. For example, the draft Asia-Pacific Privacy Charter states that consent should be 'freely-given, informed, variable and revocable'. It also states that consent is 'meaningless if people are not given full information, or have no option but to consent in order to obtain a benefit or service'.[70] PIAC sees no reason why a similar definition of consent could not be included in the Privacy Act.

PIAC also notes that the ALRC has not ruled out the possibility of prescriptive provisions about consent 'if it becomes apparent that the OPC's guidance on this issue is not being heeded or that consent exceptions in the privacy principles are being relied on inappropriately'. PIAC submits that there is ample evidence of this happening already.

PIAC notes that the ALRC has acknowledged that bundled consent can be contrary to the spirit of the privacy principles.[71] In PIAC's submission, bundled consent should be prohibited, or subjected to strict limits, which should be set out in the Act. Guidelines about this issue by the OPC would take some time to develop and would not have the same binding force as provisions in legislation or subordinate legislation.

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69 Privacy Act 1988 (Cth) s 6(1).

70 G Greenleaf and N Waters, The Asia-Pacific Privacy Charter, Working Draft 1.0, 3 September 2003 (2003) World LII Privacy Law Resources <http://www.worldlii.org/int/other/PrivLRes/2003/1.htmlat> at 10 December 2007, Principle 2.

71 Australian Law Reform Commission, Review of Australian Privacy Law, Discussion Paper 72 (2007) at [16.25].

Chapter 17. Anonymity and Pseudonymity

Proposal 17-1 The proposed Unified Privacy Principles should contain a principle called 'Anonymity and Pseudonymity' that sets out the requirements on agencies and organisations in respect of anonymous and pseudonymous transactions with individuals.

PIAC supports Proposal 17-1. It is appropriate that the anonymity principle be expanded to cover agencies as well as organisations. PIAC notes that the public sector is already subject to anonymity principles in Victoria, Tasmania and the Northern Territory.[72]

PIAC also welcomes the inclusion of pseudonymity in the proposal. Complete anonymity will not always be possible because an agency or organisation may need to have some means of differentiating between individuals. Pseudonymity provides a practical alternative in situations where the agency or organisation needs to be able to differentiate, but does not need to know the name and other personal details of the individual.

Proposal 17-2 The proposed 'Anonymity and Pseudonymity' principle should include a pseudonymity requirement that when an individual is transacting with an agency or organisation, the agency or organisation must give the individual the option of identifying himself or herself by a pseudonym. This requirement is limited to circumstances where providing this option is lawful, practicable and not misleading.

PIAC supports Proposal 17-2 for the reasons outlined above. However, UPP 1, as drafted, does not reflect the strong wording of Proposal 17-2. It simply states that individuals who are transacting with an agency or organisation 'should have' the option of not identifying themselves, or identifying themselves with a pseudonym. In PIAC's submission, the UPP should be reworded to place a clear obligation on organisations and agencies to provide the option to transact anonymously or pseudonymously, as this is what proposal 17-2 contemplates. PIAC suggests that the first of UPP 1 should be as follows:

> Wherever it is lawful and practicable, agencies and organisations when transacting with an individual must give the individual the clear option of … [emphasis added]

Proposed UPP 1(b) states that individuals transacting pseudonymously should have the option of identifying themselves with a pseudonym 'provided this would not be misleading'. PIAC is concerned that this requirement could generate confusion. By their very nature, pseudonyms are designed to mislead. PIAC suggests deletion of this requirement, or an alternate form of wording to make it clear that pseudonyms cannot be used with deliberate intent to commit fraud or to deliberately pass oneself off as another real person.

Strict limits need to be placed around the 'practicable' exception so that it is not used as an 'out' in any situation where allowing an individual to transact anonymously or pseudonymously would cost money or require a change in system design. The cost and financial burden of complying with the UPP should be considered in the context of the size and financial resources of the agency or organisation in question.

If UPP 1 is to have any effect at all in protecting personal information, it is crucial that it be considered by agencies and organisations at the design stage of new information systems and other initiatives.

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[72] Information Privacy Act 2000 (Vic) sch 1, IPP 8.1; Personal Information Protection Act 2004 (Tas) sch 1, PPIP 8; Information Act 2002 (NT) sch 2, IPP 8.

Otherwise there is a danger that further down the track, the excuse of impracticability will be relied upon to justify failure to offer anonymous or pseudonymous use options. PIAC understands that this has been a significant problem with electronic road tolls, smart cards for use in public transport systems and RFID technology. PIAC submits that UPP 1 should include the following, additional obligation:

> Organisations and agencies must design information systems to facilitate the practicable observance of UPP 1.

Proposal 17-3 The proposed 'Anonymity and Pseudonymity' principle should provide that, subject to the relevant qualifications in the principle, an agency or organisation is required to give individuals the clear option to transact anonymously or pseudonymously.

PIAC supports Proposal 17-3.

Proposal 17-4 The Office of the Privacy Commissioner should provide guidance to agencies and organisations on: (a) when it is and is not lawful and practicable to give individuals the option to transact anonymously or pseudonymously; (b) when it would be misleading for an individual to transact anonymously or pseudonymously with an agency or organisation; and (c) what is involved in providing a clear option to transact anonymously or pseudonymously.

PIAC supports Proposal 17-4, but reiterates its concerns about OPC guidelines and fact sheets not being legally binding. PIAC would prefer that guidance be in the form of regulations, or binding Codes.

Chapter 18. Collection

Proposal 18-1

(a) The proposed Unified Privacy Principles (UPPs) should contain a principle called 'Collection' that requires agencies and organisations, where reasonable and practicable, to collect information about an individual only from the individual concerned.

(b) The Office of the Privacy Commissioner should provide guidance to clarify when it would not be reasonable and practicable to collect such information from the individual concerned.

PIAC supports Proposal 18-1(a). PIAC sees no reason why organisations and agencies should not both be subject to a requirement to collect information about an individual only from the individual concerned. PIAC notes that in some jurisdictions public sector agencies are already subject to this requirement.[73]

PIAC does not support Proposal 18-1(b). While there is clearly a need to provide clarity about the circumstances in which it will NOT be reasonable and practicable to collect information from the individual concerned, it is more appropriate that this guidance be set out in the Act itself, or in regulations or binding Codes.

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[73] For example, Privacy and Personal Information Protection Act 1998 (NSW) s 9; Privacy Act 1993 (NZ) s 6.

Proposal 18-2 The 'Collection' principle in the proposed UPPs should provide that, where an agency or organisation receives unsolicited personal information, it must either:

(a) destroy the information immediately without using or disclosing it; or

(b) comply with all the relevant principles in the UPPs that apply to the information in question, as if the agency or organisation had taken active steps to collect the information.

Generally PIAC supports Proposal 18-2 (a) and Proposal 18-2(b). However, PIAC considers that the word 'immediately' in Proposal 18-2(a) is problematic and likely to be difficult to comply with in practice. There is a risk that agencies and organisations may become hyper-vigilant about destroying information that is potentially classified as being unsolicited and that this may lead to some information being destroyed in error.

There should also be provision in UPP 2 to cover the situation where an agency or organisation receives unsolicited personal information from the individual. As currently drafted, UPP 2 is silent on this.

Proposal 18-3 The 'Collection' principle in the proposed UPPs should provide that an agency or organisation must not collect personal information unless it reasonably believes the information is necessary for one or more of its functions or activities.

Proposal 18-3 focuses on testing the reasonableness of belief of an agency or organisation, ie, did the agency or organisation reasonably believe that the information was necessary for one or more of its functions or activities? In PIAC's view a more objective and appropriate approach would be to focus on the information itself and to ask whether that information is reasonably necessary for one of more of the agency or organisation's functions or activities.

UPP 2 should also make it clear that collection should only be for a lawful purpose. At the moment, it only requires, in UPP 2.2, that the means of collection be lawful.

Chapter 19. Sensitive Information

Proposal 19 -1 The proposed Unified Privacy Principles should set out the requirements on agencies and organisations in relation to the collection of personal information that is defined as 'sensitive information' for the purposes of the Privacy Act. These requirements should be located in the proposed 'Collection' principle.

PIAC supports the principle that public sector agencies should be subject to the same additional restrictions as private sector organisations in relation to the collection of sensitive information. The risks associated with subsequent misuse of this information are no less serious where the information is collected by an agency. PIAC also notes that in Victoria, Tasmania and the Northern Territory, agencies are already subject to restrictions in the collection of sensitive information.[74]

[74] Information Privacy Act 2000 (Vic) sch 1, IPP 10.1; Personal Information Protection Act 2004 (Tas) sch 1, IPP 10(1); Information Act 2002 (NT) sch, IPP 10.1

PIAC also supports the view that the most appropriate location for provisions dealing with collection of sensitive information is in the proposed new Collection Principle (UPP 2). In PIAC's view, a separate privacy principle dealing only with sensitive information would be unnecessarily complicated.

However, PIAC believes that the additional restrictions in relation to sensitive information should not just apply at the collection stage of the information cycle. Sensitive information should also be subject to additional restrictions at other stages of the information cycle, including use and disclosure, access, retention and disposal. The consequences of misuse of sensitive information at these stages can be just as serious as at the collection stage, indeed they are often more serious. The ALRC should consider amending the other UPPs to address sensitive information, where appropriate.

Proposal 19-2 The proposed sensitive information provisions should contain an exception permitting the collection of sensitive information by an agency or organization where the collection is required or specifically authorised by or under any law.

PIAC supports Proposal 19-2. Agencies and organisations must still be able to collect sensitive information for legitimate purposes. To limit collection to circumstances where it is 'required by law' is too narrow.

Proposal 19-3 The proposed sensitive information provisions should contain an exception permitting the collection of sensitive information by an agency or organisation where the collection is necessary to lessen or prevent a serious threat to the life or health of any individual, where the individual whom the information concerns is incapable of giving consent.

PIAC is opposed to the removal of the requirement that a threat be imminent as well as serious.

Collection of sensitive information without consent is potentially a serious infringement of the privacy rights of an individual and should only be allowed in exceptional circumstances. As drafted, UPP 2.6(c) may allow an agency to collect sensitive information about a person without their consent on the basis that this information might be necessary to prevent a serious threat to their life or health at some time in the future. The requirement that a threat be imminent as well as serious indicates that there must be some degree of urgency before the exception can be allowed to operate. In PIAC's view, the requirement of imminence operates as an important safeguard. If the exception can be triggered simply when a threat is 'serious' it could be used to justify bulk collection of sensitive information without consent on the basis that the information may be useful at some time in the future to prevent serious harm (for example, collection of health information in respect of people with mental illness, where there may be a potential for serious threat to health, but no imminence, because the illness may be episodic, or controlled by medication).

The term 'incapable of giving consent' requires clarification. Does this mean that a person has to be physically or legally incapable of giving consent to the collection? What of the situation where a person is physically unable to communicate consent to the collection?[75]

[75] Privacy Act 1988 (Cth) sch 3, NPP 10.1(c) contains both these requirements.

Question 19-1 Should the proposed sensitive information provisions provide that sensitive information can be collected where all of the following conditions apply:

(a) the individual is incapable of giving consent;

(b) the collection is necessary to provide an essential service for the benefit of the individual; and

(c) the collection would be reasonable in all the circumstances.

PIAC is concerned that an 'essential service' exception is paternalistic and open to abuse. The consequences of collection in well-meaning circumstances may not necessarily be perceived by affected individuals as being beneficial. This exception should not be necessary, and should be adequately covered by the other exceptions in UPP 2.6, for example, UPP 2.6(b) and UPP 2.6(d).

Additional Comment

UPP 2.6(d) should include reference to non-profit organisations that have disability aims.

Chapter 20. Specific Notification

Proposal 20-1 The proposed Unified Privacy Principles should contain a principle called 'Specific Notification' that sets out the requirements on agencies and organisations to provide specific notification to an individual of particular matters relating to the collection and handling of personal information about the individual.

PIAC supports the requirements relating to Specific Notification being set out in a separate UPP. The current position—where notification requirements are dealt with as part of the 'Collection' principle—is confusing and fails to give adequate recognition to the importance of notification. A separate principle for notification is also consistent with the Asia-Pacific Economic Co-operation Privacy Framework (2005)[76] and the European Parliament's Directive on the Protection of Individuals with regard to the Processing of Personal Data and the Free Movement of Such Data (1995).[77]

PIAC also agrees that it would be inappropriate to deal with 'Openness' requirements in the same privacy principle as Notification requirements. 'Openness' requires individuals to be informed about the general practices of an agency or organisation in relation to the handling of any personal information, whereas 'Notification' applies to the handling of an individual's particular information.

Proposal 20-2 The proposed 'Specific Notification' principles should provide that, at or before the time (or, if that is not practicable, as soon as practicable after) an agency or organisation collects personal information about an individual, it must take reasonable steps to ensure that the individual is aware of the:

(a) fact and circumstances of collection (for example, how, when and from where the information was collected);

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76 See Asia-Pacific Economic Co-operation, APEC Privacy Framework (2005) Principle II.

77 See European Parliament, Directive on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, Directive 95/46/EC (1995) Arts 10 & 11.

(b) identity and contact details of the agency or organisation;

(c) fact that the individual is able to gain access to the information;

(d) purposes for which the information is collected;

(e) main consequences of not providing the information;

(f) types of people, organisations, agencies or other entities to whom the agency or organisation usually discloses personal information; and

(g) avenues of complaint available to the individual if he or she has a complaint about the collection or handling of his or her personal information.

This requirement should only apply:

(1) in circumstances where a reasonable person would expect to be notified;

(2) except to the extent that making the individual aware of the matters would pose a serious threat to the life or health of any individual; and

(3) subject to any relevant exceptions.

Generally, PIAC supports Proposal 20-2. It is important that individuals are made aware of these factors so that they are in a position where they can make an informed decision about the extent to which they provide their personal information to an agency or organisation. This is particularly important with new technologies such as RFID tags and biometrics that are capable of collecting personal information without the knowledge of the individual.

PIAC is concerned that Proposal 20-2 contemplates that an individual may sometimes not be made aware of these factors until after his or her personal information has been collected. The circumstances in which notification after the time of collection will be acceptable should be very limited. Strong justification should be necessary where notice is not provided before or at the time of collection.

Sub-paragraph Proposal 20-2(c) should also state that the individual is able to seek correction of the information.

PIAC is concerned that sub-paragraph Proposal 20-2(f) suggests that generic descriptions of recipients of personal information will be sufficient for the purposes of notification. While PIAC accepts that it would be impossible to identify every specific agency or entity to whom information may be released, a notification that it will be released to generic categories such as 'solicitors' or 'accountants' is likely to be of very limited use to an individual who is trying to decide whether or not to provide his or her personal information in the first place. In PIAC's view, Proposal 20-2(f) should be balanced with a requirement that data collectors should have to answer specific questions from the individual about the identity of actual recipients.

PIAC also submits that the focus on the individual's awareness is potentially problematic. 'Awareness' is a difficult concept to prove as it involves making assumptions about what was in the individual's consciousness at a particular time. This will inevitably involve some degree of subjectivity. A better test

would be to look at whether the individual had, in fact, been notified. This will be easier to prove from an enforcement point of view.

PIAC agrees that the notification requirements should cover agencies as well as organisations. This will enhance government transparency and accountability in the handling of personal information.

Proposal 20-3 The Office of the Privacy Commissioner should provide guidance to assist agencies and organisations in ensuring that individuals are properly informed of the persons to whom their personal information is likely to be disclosed.

PIAC agrees that guidance is needed in the area of the obligations on agencies and organisations to properly inform individuals about to whom their personal information is likely to be disclosed. However, PIAC would prefer to see it in the Act, regulations or binding Codes.

Proposal 20-4 An agency should be required to notify an individual of the matters listed in the proposed 'Specific Notification' principle, except to the extent that the agency is required or specifically authorised by or under law not to make the individual aware of such matters.

PIAC supports Proposal 20-4.

Proposal 20-5

(a) The proposed 'Specific Notification' principle should provide that where an agency or organisation collects personal information from someone other than the individual concerned, it must take reasonable steps to ensure that the individual is or has been made aware of:

(i) the matters listed in Proposal 20.2; and

(ii) on request by the individual, the source of the information.

(b) this requirement should only apply:

(i) in circumstances where a reasonable person would expect to be notified;

(ii) except the extent that making the individual aware of the matters would pose a serious threat to the life or health of any individual; and

(iii) in the case of an agency, except to the extent that it is required or specifically authorised by or under the law not to make the individual aware of one or more of these matters.

Generally, PIAC supports Proposal 20-5.

However, PIAC is concerned that there is no requirement for the timing of notification, as there is with Proposal 20-2. As mentioned above, the objective of notification is to put the individual in a position of knowledge before they make up their mind as to whether or not to give up their personal information. Their ability to make this decision is compromised if the information is not provided to them before they

make the decision. Where possible, notice should be required to be provided before or at the time of collection. If this is not possible, there must be strong justification.

Proposal 20-6 The Office of the Privacy Commissioner should provide guidance on the circumstances in which it is necessary for an agency or organisation to notify an individual when it has received personal information about the individual from a source other than the individual concerned.

PIAC agrees that the guidance outlined in Proposal 20-6 is necessary, but would prefer to see such guidance in the Act, regulations or in binding Codes.

Proposal 20-7 The Office of the Privacy Commissioner should provide guidance on the meaning of the 'reasonable steps' in the context of an agency's or organisation's obligation to fulfil its notification requirements under the proposed 'Specific Notification' principle.

PIAC agrees that the guidance outlined in Proposal 20-6 is necessary, but would again prefer to see such guidance in the Act, regulations or in binding Codes.

Chapter 21. Openness

Proposal 21-1 The proposed Unified Privacy Principles should contain a principle called 'Openness' that sets out the requirements on an agency or orgnaisation to operate openly and transparently by providing general notification in a Privacy Policy of how it manages personal information and how personal information is collected, held, used and disclosed by it.

PIAC supports Proposal 20-1. This approach will consolidate and simplify the requirements for 'Openness' that already exist in IPP 5.1 and NPP 5. A separate UPP dealing with 'Openness' will also serve to highlight the importance of this principle as a mechanism for ensuring open and transparent handling of personal information by agencies and organisations.

While PIAC supports the obligation for agencies and organisations to produce and make available a Privacy Policy, it notes that the simple fact of having a privacy policy does not necessarily mean that an agency or organisation is compliant with its obligations under the privacy principles or the privacy legislation generally. In order to be effective, a policy must also be implemented. Case law in the anti-discrimination area suggests that implementation of a policy requires effective communication of the policy to all staff and regular focused training to ensure that all staff are aware of their obligations under the policy.[78] The 'Openness' principle should make it clear that agencies and organisations should also take reasonable steps to ensure that their privacy policies are effectively implemented.

Prosposal 21-2 The Privacy Policy in the proposed 'Openness' principle should set out an agency's or organisation's policies on the management of personal information, including how the personal information is collected, held, used and disclosed. This document should also include:

(a) what sort of personal information the agency or organisation holds;

78 See for example Aleksovski v Asia Aerospace Pty Ltd [2002] FMCA 81.

(b) the purposes for which personal information is held;

(c) the avenues of complaint available to individuals in the event that they have a privacy complaint;

(d) the steps individuals may take to gain access to personal information about them held by the agency or organisation;

(e) the types of individuals about whom records are kept;

(f) the period for which each type of record is kept; and

(g) the persons, other than the individual, who can access personal information and the conditions under which they can access it.

Generally, PIAC supports Proposal 21-2. However, there should be reference in Proposal 21-2(d) to the fact that an individual can also seek correction of his or her information.

Proposal 21-3 The Office of the Privacy Commissioner should issue guidance on how agencies and organisations can comply with their obligations in the proposed 'Openness' principle to produce and make available a Privacy Policy.

PIAC supports Proposal 21-3. However, to ensure that the 'Openness' principle is actually operating effectively, it will be vital for the Office of the Privacy Commissioner to also conduct audits of the record-keeping practices of agencies and organisations (see the comments below in relation to Proposal 44-6). These audits should include review of the agency or organisation's privacy policy to ensure that it does in fact meet the specifications set out in UPP 4.1.

The Office of the Privacy Commissioner should also provide guidance to organisations and agencies on how to implement their privacy policies effectively (see the comments above in relation to Proposal 21-1).

Proposal 21-4 An agency or organisation should take reasonable steps to make its Privacy Policy, as referred to in the proposed 'Openness' principle, available without charge to an individual:

(a) electronically (for example, on its website, if it possesses one); and

(b) in hard copy, on request.

Generally PIAC supports Proposal 21-4. However, PIAC notes that electronic publication may not always be an appropriate form of communication (for example, if a person is blind or if they are financially disadvantaged and without access to a computer). Similarly, providing a hard copy of the policy to an individual who is illiterate, or who does not speak English may not be appropriate. There should be an alternative means of making the policy available in these circumstances. PIAC suggests addition of the following wording to UPP 4.2:

> (c) in circumstances where the individual is unable to access the Privacy Policy electronically or in hard copy, the policy should be made available in such other form as the individual requests.

Proposal 21.5 The Office of the Privacy Commissioner should continue to encourage and assist agencies and organisations to make available short form privacy notices summarising their personal information handling practices. Short form privacy notices should be seem as supplementing the more detailed information that is required to be made available to individuals under the Privacy Act.

PIAC supports Proposal 21-5.

Chapter 22. Use and Disclosure

Proposal 22-1 The proposed Unified Privacy Principles should contain a principle called 'Use and Disclosure' that sets out the requirements on agencies and organisations in respect of the use or disclosure of personal information for a purpose other than the primary purpose of collecting the information.

PIAC supports Proposal 22-1. Consolidation of the use and disclosure provisions in the IPPs and NPPs into a single privacy principle is consistent with the OECD Guidelines. PIAC also notes that there is sometimes confusion about whether an action is a 'use' or a 'disclosure'. In the past, this has led to confusion about which principle applies. Combining both use and disclosure in the same privacy principle will avoid the need to categorise the action at the outset as either one or the other, and should therefore be more workable from a practical point of view.

PIAC also agrees that the 'Use and Disclosure' principle should apply to both agencies and organisations.

Proposal 22-2 The proposed 'Use and Disclosure' principle should contain an exception permitting an agency or organisation to use or disclose an individual's personal information for a purpose (the secondary purpose) other than the primary purpose of collection if the:

(a) secondary purpose is related to the primary purpose and, if the personal information is sensitive information, directly related to the primary purpose of collection; and

(b) individual would reasonably expect the agency or organisation to use or disclose the information for the secondary purpose.

PIAC opposes Proposal 22-2(a). The requirement of a direct relationship between the secondary and primary purposes should apply for both sensitive and non-sensitive personal information. PIAC sees no reason for adopting the less stringent requirement of 'related' when research indicates that most Australians have a high level of concern about use of their personal information for a purpose other than its original purpose. PIAC also notes that a number of other jurisdictions have a direct relationship test.[79]

PIAC supports Proposal 22-2(b).

[79] See for example, Privacy and Personal Information Protection Act 1998 (NSW), s 17(b); Personal Data (Privacy) Ordinance (Hong Kong) 1996, Schedule 1, Data Protection Principle 3(b) , which refers to 'a purpose directly related to the purpose referred to in paragraph (a) (the purpose of collection)').

Proposal 22-3 The proposed 'Use and Disclosure' principle should contain an exception permitting the agency or organisation to use or disclose an individual's personal information for a purpose (the secondary purpose) other than the primary purpose of collection if the agency or organisation reasonably believes that the use or disclosure for the secondary purpose is necessary to lessen or prevent a serious threat to:

(a) an individual's life, health of safety, or

(b) public health or safety.

PIAC opposes Proposal 22-3. The condition that a threat be both serious and imminent should be retained. See the comments above in relation to Proposal 19.3.

Question 22-1 Should the proposed 'Use and Disclosure' principle contain an exception allowing an agency or organisation to use or disclose personal information for a purpose other than the primary purpose of collection where this is 'required or specifically authorised by or under law' instead of simply 'required or authorised under law'?

PIAC supports the proposed limit to the exception. This would narrow the scope of the exception considerably, but PIAC feels that this is justified given the high degree of public concern about use of personal information for purposes other than its original purpose.

Chapter 23. Direct Marketing

Proposal 23-1 The proposed Unified Privacy Principles should regulate direct marketing by organisations in a discrete privacy principle, separate from the 'Use and Disclosure' privacy principle. This principle should be called 'Direct Marketing' and it should apply irrespective of whether the organisation has collected the individual's personal information for the primary purpose or a secondary purpose of direct marketing.

PIAC supports the proposal that there should be a separate UPP dealing with direct marketing. The current position, where direct marketing is dealt with under the 'Use and Disclosure' principle in NPP 2 is confusing, and gives the erroneous impression that direct marketing is only an issue at the use and disclosure stage of the information cycle. A separate principle would provide greater clarity and emphasise the importance of having strict controls on direct marketing at all stages of the information cycle.

PIAC also supports the approach that the proposed 'Direct Marketing' principle should apply irrespective of whether the relevant personal information was collected for the primary purpose or secondary purpose of direct marketing. In many cases it will be difficult to determine whether direct marketing is a primary or a secondary purpose of collection. The proposed UPP will avoid the need to get bogged down in this type of argument.

Question 23-1 Should agencies be subject to the proposed 'Direct Marketing' principle? If so, should any exceptions or exemptions apply specifically to agencies?

In PIAC's view, the 'Direct Marketing' principle should extend to agencies. There has been an increasing tendency for government agencies to use direct marketing techniques to promote government services

and programs.[80] Extension of the 'Direct Marketing' principle to cover agencies would also be consistent with Proposal 15-2 (the development of a single set of privacy principles applicable to both the public and the private sector).

There should be exceptions in circumstances where government agencies have a legitimate reason for communicating information to individuals, eg, public health and safety campaigns.

Proposal 23-2 The proposed 'Direct Marketing' principle should set out the generally applicable requirements for organisations engaged in the practice of direct marketing. These requirements should be displaced, however, to the extent that more specific sectoral legislation regulates a particular aspect of type of direct marketing.

PIAC conditionally supports Proposal 23-2, but only where sectoral legislation imposes more stringent requirements on direct marketing than the standards in the Privacy Act, ie, the words 'more specific' in Proposal 23-2 should be replaced with the words 'more stringent'. It is important that the 'Direct Marketing' principle in Privacy Act sets out the minimum standards that are to apply. Otherwise there is a risk of gradual erosion of the 'Direct Marketing' principle through other sectoral legislation over time. This would be inappropriate, given the high degree of public concern that exists about direct marketing.

PIAC notes that the ALRC disagrees with this approach on the basis that it 'would ultimately undermine the responsiveness of the regime to the specific needs of a particular type of direct marketing'.[81] With respect, the privacy regulation regime in Australia should be primarily responsive to the privacy protection needs of individuals, rather than to the commercial needs of direct marketers.

Proposal 23-3 The proposed 'Direct Marketing' principle should require organisations to present individuals with a simple means to opt out of receiving direct marketing communications.

PIAC supports an 'opt-out' model. PIAC suggests adding the words 'at any time' to the end of Proposal 23.3.

Proposal 23-4 The proposed 'Direct Marketing' principle should provide that an organisation involved in direct marketing must comply, within a reasonable time, with an individual's request not to receive direct marketing communications.

PIAC prefers a model that requires the organisation involved in direct marketing to comply within a specified time with an individual's request not to receive direct marketing communications. A 'reasonable time' requirement is too vague and open to self-serving interpretations by direct marketing organisations.

Proposal 23-5 The proposed 'Direct Marketing' principle should provide that an organisation involved in direct marketing must, when requested by an individual to whom it has sent direct marketing communications, take reasonable steps to advise the individual from where it acquired the individual's personal information.

PIAC strongly supports Proposal 23-5. This will empower individuals to take back control over the use of their personal information, and if they wish to, to take steps to remove their details from direct marketing

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80 For example, use of direct marketing by government agencies to promote tourism. See for example Government of South Australia, Local Government Engagement in Tourism – Final Report: (2006) <http://www.tourism.sa.gov.au/webfiles/tourismpolicy/LGEIT_Final _Report.pdf> at 20 December 2007.

81 Australian Law Reform Commission, Review of Australian Privacy Law, Discussion Paper 72 (2007) [23.34].

lists. It will also encourage organisations to carefully consider whether they have a legitimate basis for collecting the personal information in the first place.

Proposal 23-6 The Office of the Privacy Commissioner should issue guidance to organisations involved in direct marketing, which should:

(a) highlight their obligation to maintain the quality of any database they hold containing personal information and assists them in achieving this requirement; and

(b) clarify their obligations under the Privacy Act in dealing with particularly vulnerable people, such as elderly individuals and individuals aged 14 and under.

PIAC supports Proposal 23-6(a) and (b).

Chapter 24. Data Quality

Proposal 24-1 The proposed Unified Privacy Principles (UPPs) should contain a principle called 'Data Quality' that applies to agencies and organisations.

PIAC supports Proposal 24-1. The quality of the personal information that is collected, used and disclosed by agencies and organisations is vitally important. Inaccurate or incomplete information may lead to an individual being denied a service or suffering some other negative consequence. It is appropriate that the significance of data quality be recognised in a separate privacy principle.

The uneven treatment of agencies and organisations in relation to data quality requirements has been a source of confusion in the Privacy Act. A single principle dealing with data quality for both agencies and organisations would lead to greater consistency and increased public confidence in agency handling of personal information.

Proposal 24-2 The proposed 'Data Quality' principle should require an agency or organisation to take reasonable steps to make sure that the personal information it collects, uses or discloses is, with reference to a purpose of collection permitted by the proposed UPPs, accurate, complete, up-to-date and relevant.

PIAC supports Proposal 24-2. PIAC particularly welcomes the requirement that the information be 'relevant', which is consistent with the OECD Guidelines, the European Parliament's Directive on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (1995) and the Personal Information Protection Act 2004 (Tas).

The Data Quality principle should apply to information that is in the possession or control of the agency or organisation. PIAC supports the extension of the principle to control, as this would oblige agencies and organisations to ensure the quality of data that may have temporarily left their possession, eg, through outsourcing of a function to another entity.

Chapter 25. Data Security

Proposal 25-1 The proposed Unified Privacy Principles (UPPs) should contain a principle called 'Data Security' that applies to agencies and organisations.

PIAC supports Proposal 25-1. Technological advances have resulted in an increased incidence of identity theft in Australia[82], and it is vitally important to ensure that data security obligations, particularly in electronic envirnments, are clearly understood and broadly applicable. A single Data Security principle applicable to both agencies and organisations would be consistent with OECD Guidelines and also with the EU Directive. PIAC also notes that the privacy laws of a number of other jurisdictions, including the United Kingdom[83] and Germany[84] contain separate data security provisions that apply to both the public and private sectors.

Proposal 25-2 The proposed 'Data Security' principle should require an agency or organisation to take reasonable steps to ensure that personal information it discloses to a person pursuant to a contract, or otherwise in connection with the provision of a service to the agency or organisation, is protected from being used or disclosed by that person otherwise than in accordance with the UPPs.

Generally, PIAC supports Proposal 25-2. This obligation, along with the proposal to remove the small business exemption (Proposal 35-1) should ensure that there will be very few situations where contractors will be able to operate without being subject to privacy obligations. However, there may be circumstances where personal information might be disclosed to a person otherwise than under a contract, or in connection with the provision of a service. The obligation should therefore apply to all personal information the agency or organisation discloses to a person, except where the disclosure is required by law.

The obligation should go beyond protection of the information from use or disclosure. It should also oblige the agency/organisation to ensure that the recipient undertakes to observe the standards of other applicable UPPs, such as UPPs 3, 7, 8 and 11.

Proposal 25-3 The Office of the Privacy Commissioner should provide guidance about the meaning of the term 'reasonable steps' in the context of the proposed 'Data Security' principle. Matters that could be dealt with in this guidance include:

(a) the inclusion of contractual provisions binding a contracted service provider of an agency or organisation to handle the personal information consistently with the UPPs;

(b) technological developments in this area and particularly in relation the relevant encryption standards; and

(c) the importance of training staff adequately as to the steps they should take to protect personal information.

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82 Sharri Markson, 'Internet fuels identity theft: Criminals raid bank accounts', The Daily Telegraph (Sydney), 2 December 2007, 2.

83 Data Protection Act 1998 (UK) s 5, Principle 7

84 Federal Data Protection Act 1990 (Germany) s 9, Annex.

PIAC submits that the 'Data Security' principle should contain more detail about what is meant by 'reasonable steps'. PIAC notes that the Security Principle in the APEC Privacy Framework imports an element of proportionality, stating that safeguards against risk 'should be proportional to the likelihood and severity of the harm threatened, the sensitivity of the information and the context in which is held, and should be subject to periodic review and reassessment'.[85] PIAC sees no reason why similar wording could not be used in the proposed 'Data Security' principle, and supplemented by further, more detailed guidance from the OPC.

PIAC supports the proposal that OPC Guidelines should include the matters listed in Proposal 25-3(a), (b) and (c). However, it is also important that the OPC should provide guidance on obligations in relation to physical security of information systems and security of computer networks and communications. PIAC notes that the OPC has already provided guidance on these matters in 2001.[86] However, given the increasing incidence of identity theft in Australia that is referred to above, PIAC suggests that these guidelines be updated to take account of more recent technological developments.

Proposal 25-4 The proposed 'Data Security' principle should require an agency or organisation to take reasonable steps to destroy or render non-identifiable personal information if it is no longer needed for any purpose permitted by the UPPs.

There are significant risks to privacy where agencies and organisations retain personal information for lengthy periods of time. PIAC agrees that both agencies and organisations should be required to destroy or render non-identifiable personal information when this information is no longer necessary.

However, in certain circumstances there is a strong public interest in agencies and organisations having to preserve personal information, at least for a specific period of time, so that individuals are able to asset legitimate legal rights.

Much of PIAC's work in the Stolen Wages project (discussed in relation to Proposal 3-11) would not have been possible if personal information of claimants had been destroyed or rendered non-identifiable by government agencies. PIAC also acts for a number of clients who are seeking to recover damages for false imprisonment in the criminal justice system, immigration detention or psychiatric institutions. In gathering evidence to substantiate these claims it is often necessary for PIAC to access its clients' files and other records from the government agencies that they have had dealings with, or from organisations that have been contracted by these government departments to provide services to the clients.

PIAC is concerned that the wording 'if it is no longer needed for any purpose permitted under the proposed UPPs' is too vague and may be difficult to apply in practice (see the earlier comments in relation to Proposal 3-11). It will be the agency or organisation that will define the purpose for which the information is needed under the UPPs. It will also be the agency or organisation that decides when information is no longer needed for that purpose. The individual will have little basis on which to challenge these decisions and there is a risk that this Principle may be used as an excuse for wholesale destruction of information that is damaging to the organisation or agency (for example, in situations where the organisation or agency may have a potential legal liability to the individual). The difficulty is that once the information is destroyed or de-identified, it is impossible for the individual to recover it.

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85 Asia-Pacific Economic Corporation, APEC Privacy Framework, (2005) <http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(03995EABC73F94816C2AF4AA2645824B)~APEC+Privacy+Framework.pdf/$file/APEC+Privacy+Framework.pdf> at 20 December 2007.

86 Office of the Federal Privacy Commissioner, Security and Personal Information, Information Sheet 6 (2001).

The following is PIAC's proposed rewording of Proposal 25-4:

> Proposal 25-4 The proposed 'Data Security' principle should require an agency or organisation to take reasonable steps to destroy or render non-identifiable personal information if it is no longer needed for any purpose permitted by the UPPs or as required by law. Prior to destruction the person about whom the information is held should be offered the opportunity to obtain a full copy of the information. (emphasis added)

Proposal 25-5 The Office of the Privacy Commissioner should provide guidance about when it is appropriate for an agency or organisation to destroy or render non-identifiable personal information that is no longer needed for a purpose permitted under the UPPs. This guidance should cover, among other things:

(a) personal information that forms part of an historical record;

(b) personal information, or a record of personal information, that may need to be preserved, in some form, for the purpose of future dispute resolution; and

(c) the interaction between the UPPs and legislative records retention requirements.

PIAC supports Proposal 25-5. In preparing this guidance, the OPC should consult with consumer groups, privacy advocates and community legal centres.

Proposal 25-6 The Office of the Privacy Commissioner should provide guidance about what is required of an agency or organisation to destroy or render non-identifiable personal information, particularly when that information is held or stored in electronic form.

PIAC agrees that the OPC should provide the guidance set out in Proposal 25-6. However, PIAC sees no reason why there should not also be clear definitions in the Act of the terms 'destroy' and 'render non-identifiable'. An appropriate definition of 'render non-identifiable' would be 'taking reasonable steps to prevent future re-identification of data'.

Chapter 26. Access and Correction

Proposal 26-1 The proposed Unified Privacy Principles (UPPs) should contain a principle called 'Access and Correction' that:

(a) sets out the requirements that apply to organisations in respect of personal information that is held by organisations; and

(b) contains a note stating that the provisions dealing with access to, and correction of personal information held by agencies are located in a separate part of the Privacy Act.

PIAC supports Proposal 26-1.

Proposal 26-2

(a) The proposed 'Access and Correction' principle should provide that, where an organisation is not required to provide an individual with access to his or her personal information because of an exception to the general provision granting a right of access, the organisation must take reasonable steps to reach an appropriate compromise, involving the use of a mutually agreed intermediary, that would allow for sufficient access to meet the needs of both parties.

(b) The Office of the Privacy Commissioner should provide guidance about the meaning of 'reasonable steps' in this context, making clear, for instance, that an organisation need not take any steps where there would undermine a lawful reason for denying a request in the first place.

PIAC strongly endorses Proposal 26-2(a). The existing provision in NPP 6.3 for an organisation to merely 'consider' the use of intermediaries does not go nearly far enough in protecting the access rights of individuals and has the potential to impact adversely on individuals from non-English speaking backgrounds and individuals with decision-making disabilities.

However, PIAC is concerned about the wording at the end of proposed UPP 9.3 ('provided that the compromise would allow sufficient access to meet the needs of both parties'). This seems to restrict the operation of the principle in a way that does not appear to be contemplated by Proposal 26.2(a). Proposal 26.2(a) appears to see sufficient access to meet the needs of both parties as an objective, whereas proposed UPP 9.3 appears to treat it is as a condition.

PIAC supports Proposal 26-2(b). There is clearly a need for guidance in this area and the OPC is probably the best body to provide such guidance.

Proposal 26-3 The proposed 'Access and Correction' principle should provide that an organisation must respond within a reasonable time to a request from an individual for access to personal information held by the organisation. The Office of the Privacy Commissioner should provide guidance about the meaning of 'reasonable time' in this context.

Delay by organisations and/or agencies in responding to requests for access to personal information has been a common feature of many of the privacy cases that PIAC has dealt with. This has been frustrating and costly for PIAC's clients, and has impaired their ability to assert their rights. PIAC submits that there should be greater clarity about an appropriate time for response and that this should be set out in the Act, rather than in non-binding OPC Guidelines. PIAC notes that the Information Privacy Act 2000 (Vic) provides that the organisation must provide access, or reasons for denial of access, as soon as practicable, but not later than 45 days after receiving the request.[87] In PIAC's submission, a similar requirement in UPP 9 would not be unduly onerous for organisations.

The 'Access and Correction' principle should also incorporate the other aspects of OECD Guideline 13(b), namely that the organisation must respond in a reasonable manner, at a charge, if any, that is not excessive, and in a form that is readily intelligible to the individual.

87 Information Privacy Act 2000 (Vic) sch 1 IPP 6.8.

While PIAC agrees that the privacy principles should not be overly prescriptive, it is its submission that there is scope in UPP 9 to provide greater clarity about the fees that can be charged for accessing personal information. Organisations can easily deflect requests for access by charging excessive fees. Where clients are financially disadvantaged they have little prospect of being able to pay such fees, and even less prospect of challenging the basis upon which the fees have been calculated by the organisation. In PIAC's view, UPP 9 should specify a maximum fee or there should be a schedule of fees set out in the regulations. This would have much greater force than non-binding OPC Guidelines.

Proposal 26-4 The proposed 'Access and Correction' principle should provide that where in accordance with this principle, an organisation has corrected personal information it holds about an individual, and the individual requests that the organisation notify any other entities to whom the personal information has already been disclosed prior to correction, the organisation must take reasonable steps to do so, provided such notification would be practicable in the circumstances.

Generally, PIAC supports Proposal 26-4. However, the organisation's obligations to notify should not necessarily be triggered by a request from the individual. There may be circumstances where an individual may not be able to make such a request, for example, where they have a decision-making disability. Where this happens, the organisation should still notify recipients about the correction, as this will reduce the risk of the incorrect information being used or disclosed by recipients.

Proposal 26-5 The proposed 'Access and Correction' principle should provide that where an organisation holds personal information about an individual that the individual wishes to have corrected or annotated, the individual should seek to establish that the personal information held by the organisation is, with reference to a purpose of collection permitted by the UPPs, not accurate, complete, up-to-date and relevant.

Generally PIAC supports Proposal 26-5. However, there needs to be greater clarity about the standard of proof required in order for the individual to establish that the information is 'not accurate, complete, up-to-date and relevant'. Arguably, as currently worded, UPP 9 could be read as requiring a high degree of proof that may be too onerous for the individual to meet. PIAC suggests that there be a lower threshold, eg, 'the individual is able to establish on the balance of probabilities'.

Proposal 26-6 The proposed 'Access and Correction' principle should provide that, where an organisation holds personal information about an individual, it is not required to provide access to that information to the individual to the extent that providing access would be reasonably likely to pose a serious threat to the life or health of any individual.

In PIAC's view the words 'serious threat' in Proposal 26-6 should be replaced with the words 'serious and imminent threat (see PIAC's comments above in relation to Proposals 19.3 and 22.3).

Chapter 27. Identifiers

Proposal 27-1 The proposed Unified Privacy Principles (UPPs) should contain a principle called 'Identifiers' that applies to agencies and organisations. As a consequence, section 100(2) and (3) of the Privacy Act should be amended to apply also to agencies.

PIAC supports Proposal 27-1. Accommodation of identifiers within other privacy principles such as collection, use and disclosure would be unnecessarily complex, and would fail to give adequate recognition to the serious privacy risks associated with the misuse of identifiers.

PIAC is concerned about the increasing number of identifiers being developed by government agencies as they strive to deliver services more efficiently and in a 'joined-up government' manner. PIAC strongly supports the position that any 'Identifiers' privacy principle should also cover agencies.

Proposal 27-2 The proposed 'Identifiers' principle should define 'identifier' inclusively to mean a number, symbol or any other particular that:

(a) uniquely identifies an individual for the purpose of the agency's or organisation's operations; or

(b) is determined to be an identifier by the Office of the Privacy Commissioner.

However, an individual's name or ABN, as defined in the A New Tax System (Australian Business Number) Act 1999 (Cth) is not an 'identifier'.

PIAC supports Proposal 27-2(a). PIAC is concerned that Proposal 27-2(b) gives too broad a discretion to the OPC and that any determinations by the OPC are liable to be disallowed by the Australian Parliament in any event.

Proposal 27-3 The proposed 'Identifiers' principle should contain a note stating that a determination referred to in the 'Identifiers' principle is a legislative instrument for the purposes of s 5 of the Legislative Instruments Act 2003 (Cth).

PIAC gives conditional support to Proposal 27-3, subject to the comments above regarding its concerns about the OPC having the power to make these determinations.

Proposal 27-4 The proposed 'Identifiers' principle should regulate the use by agencies and organisations of identifiers that are assigned by state and territory agencies.

PIAC support Proposal 27-4.

Question 27-1 Should the Privacy Act regulate the assignment of identifiers by agencies, organisations or both? If so, what requirements should apply and should these requirements be located in the proposed UPPs or elsewhere?

It is PIAC's view that the Privacy Act should regulate the assignment of identifiers by both agencies and organisations. PIAC endorses the views expressed by Electronic Frontiers Australia in its response to Issues Paper 31, namely 'unique identifiers should not be created except when necessary for a particular primary

purpose, eg, credit card numbers, and use and disclosure be restricted to purposes directly related to the primary purpose of creation'.[88] Requirements should be located in proposed UPP 10.

Proposal 27-5 Before the introduction by agencies of any unique multi-purpose identifier, the Australian Government, in consultation with the Privacy Commissioner, should consider the need for a privacy impact assessment.

PIAC opposes Proposal 27-5 because it fails to mandate a privacy impact assessment. A privacy impact assessment should be mandatory for multi-purpose identifier projects because of the potentially serious implications of these projects for individual privacy.[89]

Proposal 27-6 The Office of the Privacy Commissioner, in consultation with the Australian Taxation Office and other relevant stakeholders, should review the Tax File Number Guidelines issued under section 17 of the Privacy Act.

PIAC supports Proposal 27-6.

Chapter 28. Trans-border Data Flows

Proposal 28-1 The Privacy Act should be amended to clarify that it applies to acts done, or practices engaged in, outside Australia by an agency.

PIAC supports Proposal 28-1. This is a particularly important proposal, given that agencies are frequently able to compel the collection of personal information. Any amendment should be expressed in clear and unambiguous language to ensure that it displaces the common law presumption that courts do not read extra-territorial jurisdiction into legislation.[90]

Proposal 28-2 The proposed Unified Privacy Principles (UPPs) should contain a principle called 'Trans-border Data Flows' that applies to agencies and organisations.

PIAC supports Proposal 28-2.

Proposal 28-3 The proposed 'Trans-border Data Flows' principle should provide that an agency or organisation in Australia or an external territory may transfer personal information about an individual to a recipient (other than the agency, organisation or individual) who is outside Australia if the transfer is necessary for one of more of the following by or on behalf of an enforcement body:

(a) the prevention, detection, investigation, prosecution or punishment of criminal offences, breaches of a law imposing a penalty or sanction or breaches of a prescribed law;

(b) the enforcement of laws relating to the confiscation of the proceeds of crime;

(c) the protection of the public revenue;

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88 Electronic Frontiers Australia Inc, Submission PR 76, 8 January 2007.

89 Some of these implications are set out in PIAC's comments on the exposure drafts on the Access Card legislation: Public Interest Advocacy Centre, Access Card Proposal Still Fails Public Interest Test: Comment on the Exposure Drafts of the Access Card Legislation (2007)

90 See Jumbunna Coal Mine NL v Victorian Coal Miners Association (1908) 6 CLR 309.

(d) the prevention, detection, investigation or remedying of seriously improper conduct or proscribed conduct;

(e) the preparation for, or conduct of, proceedings before any court or tribunal, or implementation of the orders of a court or tribunal; or

(f) extradition and mutual assistance.

Generally PIAC agrees that there should be an exception to the proposed 'Trans-border Data Flows' principle for law enforcement, mutual assistance and extradition. However, there needs to be some clarification as to whether the term 'enforcement body' in Proposal 28.3 (and proposed UPP 11) extends to foreign enforcement bodies as well as Australian enforcement bodies. If it does, PIAC submits that this makes the exception too wide.

UPP 11(c)(iv) does not accurately reflect Proposal 28-3 (d). While the Proposal refers to 'the prevention, detection, investigation or remedying of seriously improper conduct or proscribed conduct' (emphasis added), UPP(c)(iv) refers to 'the prevention, detection, investigation or remedying of seriously improper conduct or prescribed conduct' (emphasis added).

Question 28-1 Should the Privacy Act provide that for the purposes of the proposed 'Trans-border Data Flows' principle, a 'transfer':

(a) includes where personal information is stored in Australia is such a way that it allows it to be accessed or viewed outside Australia; and

(b) excludes the temporary transfer of personal information, such as when information is emailed from one person located in Australia to another person also located in Australia, but because of internet routing, the email travels (without being viewed) outside Australia on the way to its recipient in Australia?

PIAC submits that the answer to Questions 28-1(a) and (b) is yes.

Proposal 28-4 Subject to Proposal 28-3, the proposed 'Trans-border Data Flows' principle should provide that an agency or organisation in Australia or an external territory may transfer personal information about an individual to a recipient (other than the agency, organisation or the individual) who is outside Australia only if at least one of the following conditions is met:

(a) the agency or organisation reasonably believes that the recipient of the information is subject to a law, binding scheme or contract which effectively upholds privacy protections that are substantially similar to the proposed UPPs; or

(b) the individual consents to the transfer; or

(c) the agency or organisation continues to be liable for any breaches of the proposed UPPs; and

(i) the individual would reasonably expect the transfer, and the transfer is necessary for the performance of a contract between the individual and the agency or organisation;

(ii) the individual would reasonably expect the transfer, and the transfer is necessary for the implementation of pre-contractual measures taken in response to the individual's request;

(iii) the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the individual between the agency or organisation and a third party;

(iv) all of the following apply: the transfer if for the benefit of the individual; it is impracticable to obtain the consent of the individual to the transfer; and if it were practicable to obtain such consent, the individual would be likely to give it; or

(v) before the transfer has taken place, the agency or organisation has taken reasonable steps to ensure that the information will not be dealt with by the recipient of the information inconsistently with the proposed UPPs.

PIAC is concerned that the 'reasonably believes' requirement in Proposal 28-4(a) is ambiguous and is unlikely to be adequately explained in guidance provided by the OPC. PIAC prefers the formulation in the EU Directive, which requires that the country in question must have an adequate level of protection. Alternatively, there should be an explanation in the Act or regulations as to what constitutes a 'reasonable belief'.

The words 'effectively upholds' in Proposal 28-4(a) also need clarification. It is not clear whether self-regulatory schemes would meet this test. In PIAC's view, only enforceable statutorily based privacy regimes should be covered.

The condition in Proposal 28-4(b) should specify that the individual's consent should be express or explicit. Given the high level of concern amongst Australians about their personal information being transferred outside Australia[91] it should not be sufficient for agencies and organisations to rely on implied consent or bundled consent in these circumstances, particularly as giving consent absolves the agency or organisation from liability under the proposed UPP. Consent should be fully informed, with the individual being advised about which countries his or her personal information is to be transferred to and the fact that the transferor is, by using this exception, disclaiming liability for any breaches.

PIAC opposes Proposal 28-4(c)(iv). The agency or organisation should not be able to presume that the transfer is for the 'benefit' of the individual, and that the individual would be 'likely to give consent'. This effectively removes any rights that the individual has in the process.

In relation to Proposal 28-4(c)(v), PIAC endorses the ALRC's view that before a transfer takes place, an agency or organisation must take reasonable steps to ensure that the information will not be handled by the recipient of the information in a manner that is inconsistent with the proposed UPPs. It does not make

91 As demonstrated by the ALRC's National Privacy Phone-In, June 2006.

sense for an organisation to transfer personal information about an individual, then to take reasonable steps to ensure that that the recipient will not deal with it inconsistently with the proposed UPPs.

Proposal 28-5 The proposed 'Use and Disclosure' principle should contain a note stating that agencies and organisations are subject to the requirements of the proposed 'Trans-border Data Flows' principle when transferring personal information about an individual to a recipient who is outside Australia.

PIAC supports Proposal 28-5. There is a need to draw attention to the links between the two principles in order to avoid confusion.

Proposal 28-6 The proposed 'Trans-broder Data Flows' principle should contain a note stating that agencies and organisations are subject to the requirements of the proposed 'Use and Disclosure' principle when transferring personal information about an individual to a recipient who is outside Australia.

PIAC agrees with Proposal 28-6. See the comments above for Proposal 28-5.

Proposal 28-7 Section 13B of the Privacy Act should be amended to clarify that, if an organisation transfers personal information to a related body corporate outside Australia, this transfer will be subject to the proposed 'Trans-border Data Flows' principle.

PIAC agrees with Proposal 28-7.

Proposal 28.8 The Australian Government should develop and publish a list of laws and binding schemes that effectively uphold principles for fair handling of personal information that are substantially similar to the proposed UPPs.

In PIAC's view, the existence of the list suggested in Proposal 28-8 would make UPP 11 much more workable for individuals, agencies and organisations. PIAC agrees that the OPC is not a suitable body to take responsibility for developing the list, but should have input into the process, as should privacy advocates and consumer groups. There should be provision for the list to be regularly reviewed and updated.

Proposal 28.9 The Office of the Privacy Commissioner should develop and publish guidance on the proposed 'Trans-border Data Flows' principle, including guidance on:

(a) when personal information may become available to a foreign government;

(b) outsourcing government services to organisations outside Australia;

(c) the issues that should be addressed as part of a contractual agreement with the overseas recipient of personal information;

(d) when a transfer of personal information is 'for the benefit' or 'in the interests of' the individual concerned; and

(e) what constitute 'reasonable steps' to ensure that the information it has transferred will not be held, used or disclosed by the recipient of the information consistently with the proposed UPPs.

PIAC supports Proposal 28-9. PIAC also considers that it would be helpful if the OPC set out model contractual provisions in the same way that the Victorian Privacy Commissioner has done in its Model Terms for Trans-border Data Flows of Personal Information.

Proposal 28-10 The Privacy Policy of an agency or organisation, referred to in the proposed 'Openness' principle should set out whether personal information may be transferred outside Australia.

Organisation and Agency Privacy Policies should also specify to which countries the personal information may be transferred.

Question 28-2 Would the use of trustmarks be an effective method of promoting compliance with and enforcement of, the Privacy Act and other international privacy regimes? If so, should they be provided for under the Privacy Act?

PIAC remains unconvinced about the effectiveness of trustmarks as an effective method of promoting compliance with privacy laws. While such approaches may operate effectively in jurisdictions with extremely active and well-resourced consumer sectors and a large enough market to support a diversity of alternative suppliers, it is PIAC's view that trustmark do not provide sufficient guarantee of privacy protection.

Chapter 29. Additional Privacy Principles

There are no proposals in this chapter and PIAC has nothing further to add.

Part E – Exemptions

Chapter 30. Overview

Proposal 30-1 The Privacy Act should be amended to group together in a separate part of the Act exemptions for certain categories or types of acts and practices.

PIAC supports Proposal 30-1.

Proposal 30-2 The Privacy Act should be amended to set out in a schedule to the Act exemptions for specific, named entities. The schedule should distinguish between entities that are completely exempt and those that are partially exempt from the Privacy Act. For those entities that are partially exempt, the schedule should specify those acts and practices that are exempt.

PIAC supports Proposal 30-2.

Chapter 31. Defence and Intelligence Agencies

Proposal 31-1 The privacy rules and guidelines which relate to the handling of intelligence information concerning Australian persons by the Australian Security Intelligence Organisation, Australian Security Intelligence Service, Defence Industry and Geospatial Organisation, Defence Signals Directorate and Office of National Assessments, should be amended to include consistent rules and guidelines relating to:

(a) incidents involving the incorrect use and disclosure of personal information (including a requirement to contact the Inspector-General of Intelligence and Security and advise of the incident and the measures taken to protect the privacy of the Australian person);

(b) the accuracy of personal information; and

(c) the storage and security of personal information.

PIAC supports Proposal 31-1.

Proposal 31-2 Section 15 of the Intelligence Services Act 2001 (Cth) should be amended to provide that:

(a) the responsible minister in relation to the Defence Intelligence Organisation is required to make written rules regulating the communication and retention by the Defence Intelligence Organisation of intelligence information concerning Australian persons; and

(b) before making rules to protect the privacy of Australian persons, the Ministers responsible for the Australian Security Intelligence Service, the Defence Imagery and Geospatial Organisation, the Defence Signals Directorate and the Defence

Intelligence Organisation should consult with the Office of the Privacy Commissioner.

PIAC supports Proposal 31-2. Further clarification is needed under Proposal 31-2(b) as to whether the Ministers are to also continue to consult with the Inspector General of Intelligence and Security (IGIS) and the Federal Attorney-General.

Proposal 31-3 The Office of National Assessments Act 1977 (Cth) should be amended to provide that:

(a) the responsible minister in relation to the Office of National Assessments (ONA) is required to make written rules regulating the communication and retention by the ONA of intelligence information concerning Australian persons; and

(b) before making rules to protect the privacy of Australian persons, the minister responsible for the ONA should consult with the Office of the Privacy Commissioner.

PIAC supports Proposal 31-3, but reiterates that there is a need for clarification under 31-3(b) as to whether Ministers are to also continue to consult the IGIS and the Federal Attorney-General.

Proposal 31-4 Section 8A of the Australian Security and Intelligence Organisation Act 1979 (Cth) should be amended to provide that, before making rules to protect the privacy of Australian persons, the responsible minister should consult with the Office of the Privacy Commissioner.

PIAC supports Proposal 31-4.

Proposal 31-5 The privacy rules and guidelines referred to in Proposal 31-1 should be made available electronically to the public; for example on the websites of those agencies.

PIAC supports Proposal 31-5, but sees no justification for limiting this requirement to the rules referred to in Proposal 31-1. Rather Proposal 31-5 should also include a requirement that the rules referred to in Proposals 31-3, 31-4 and 31-5 also be made available electronically to the public.

Proposal 31-6 The Privacy Act should be amended to apply to the Inspector-General of the Intelligence and Security (IGIS) in respect of the administrative operations of that office.

PIAC supports Proposal 31-6.

Proposal 31-7 The Inspector-General of Intelligence and Security, in consultation with the Office of the Privacy Commissioner, should develop and publish information-handling guidelines to ensure that personal information handled by IGIS is protected adequately.

PIAC supports Proposal 31-7.

Chapter 32. Federal Courts and Tribunals

Proposal 32-1 Federal courts that do not have a policy of granting access for research purposes to court records containing personal information should develop and publish such policies.

PIAC supports Proposal 32-1.

Research has the potential to contribute to the understanding and improvement of the justice system and should be encouraged, subject to there being sufficient safeguards in place to ensure that personal information is handled properly.

Policies should cover issues such as confidentiality, obtaining informed consent from participants and restriction of access to medical or other treatment records. PIAC notes that the policy that has been developed by the Family Court is particularly comprehensive, and could serve as a model. Courts should ensure that the policies are accessible, for example, by publishing them on their websites.

Question 32-1 Should the Privacy Act be amended to provide that federal tribunals are exempt from the operation of the Act in respect of their adjudicative functions? If so, what should be the scope of 'adjudicative functions'?

PIAC sees no justification for a broad exemption for federal tribunals as a class of agencies from the Privacy Act. PIAC accepts that in some circumstances, compliance with privacy principles might cause difficulties for tribunals; for example, where there is a need for tribunals to disclose personal information for the purposes of their review functions. However, this is more appropriately dealt with by way of specific, limited exceptions to the Privacy Act.

Chapter 33. Exempt Agencies under the Freedom of Information Act 1982 (Cth)

Proposal 33-1 The Privacy Act should be amended to remove the partial exemption that applies to the Australian Fair Pay Commission under section 7(1) of the Act.

PIAC supports Proposal 33-1. This exemption appears to be an anomaly, and has no sound policy justification.

Proposal 33-2 The following agencies listed in Schedule 2 Part 1 Division 1 of the Freedom of Information Act 1982 (Cth) should be required to demonstrate to the Attorney-General of Australia that they warrant exemption from the operation of the Privacy Act:

(a) Aboriginal Land Councils and Land Trusts;

(b) Auditor-General;

(c) National Workplace Relations Consultative Council;

(d) Department of the Treasury;

(e) Reserve Bank of Australia;

(f) Export and Finance Insurance Corporation;

(g) Australian Communications and Media Authority;

(h) Classification Board;

(i) Classification Review Board;

(j) Australian Trade Commission; and

(k) National Health and Medical Research Council.

The Australian Government should remove the exemption from the operation of the Privacy Act for any of these agencies that, within 12 months do not make an adequate case for retaining their exempt status.

PIAC supports Proposal 33-2. Any exemption from the Privacy Act should be as limited as possible and justified on sound policy grounds. PIAC sees no rational basis for the position that agencies that are exempt under the FOI Act should also be automatically exempt under the Privacy Act. The purpose of the FOI Act is to promote an open, transparent government by granting a right of access to, and correction of, government records, except in relation to exempt documents. This is completely distinct from the purpose of the Privacy Act, which is to protect the privacy of the personal information of individuals.

Where one of these agencies does apply to the Federal Attorney-General to retain their exempt status, there should be provision for other interested parties such as privacy advocates and consumer groups to make submissions about the issue.

Proposal 33-3 The Privacy Act should be amended to remove the exemption for the Australian Broadcasting Corporation and the Special Broadcasting Service listed in Schedule 2 Part II Division 1 of the Freedom of Information Act 1982 (Cth).

PIAC supports Proposal 33-3.

Chapter 34. Other Public Sector Exemptions

Proposal 34-1 The Attorney-General's Department, in consultation with the Office of the Privacy Commissioner, should develop and publish information-handling guidelines for royal commissions to assist in ensuring that the personal information they handle is protected adequately.

PIAC supports Proposal 34-1.

Proposal 34-2 The Privacy Act should be amended to remove the exemption that applies to the Australian Crime Commission and the Board of the Australian Crime Commission by repealing sections 7(1)(a)(iv), (h) and 7(2) of the Act.

PIAC supports Proposal 34-2. The activities of the Australian Crime Commission (**ACC**) have the potential to impact significantly on individual privacy. The current exemption of the ACC is anomalous with the

position of other federal law enforcement agencies, which are covered by the Privacy Act. The proposed exceptions to the UPPs for law enforcement agencies should be adequate to enable the ACC to function effectively.

Proposal 34-3 The Privacy Act should be amended to apply to the Integrity Commissioner is respect of the administrative operations of his or her office.

PIAC supports Proposal 34-3.

Proposal 34-4 The Integrity Commissioner, in consultation with the Office of the Privacy Commissioner, should develop and publish information-handling guidelines to ensure that personal information handled by the Integrity Commissioner and the Australian Commission for Law Enforcement Integrity is protected adequately.

PIAC supports Proposal 34-4.

Question 34-1 Should the Privacy Act be amended to set out, in the form of an exemption, the range of circumstances in which agencies that perform law enforcement functions, such as the Australian Federal Police and the Australian Crime Commission, are not required to comply with specific privacy principles?

No, the Privacy Act should not be amended to set out, in the form of an exemption, the range of circumstances in which agencies that perform law enforcement functions, such as the Australian Federal Police and the Australian Crime Commission, are not required to comply with specific privacy principles. As stated previously, exemptions should only be made on the basis of detailed justification and should be as limited as possible.

PIAC accepts that in some circumstances there is a conflict between the work that law enforcement agencies do and compliance with the privacy principles. For example, it would ridiculous to suggest that law enforcement agencies should tell a suspect that they are collecting his or her personal information or to suggest that they could not appropriately disclose this information in the course of their investigations without the suspect's consent.

However, a general exemption for agencies that perform law enforcement functions may lead to a perception that these agencies somehow stand outside privacy law. In PIAC's view, this would set a dangerous and inappropriate precedent.

Generally, PIAC favours selective exceptions to particular principles and provisions, rather than broad exemptions. PIAC notes that there are already a number of exceptions in the Act that take account of law enforcement considerations and that this will also be the case under the proposed UPPs.[92]

Question 34-2 Should the Department of the Senate, the Department of the House of Representatives and the Department of Parliamentary Services continue to be exempt from the operation of the Privacy Act? If so, what should be the scope of the exemption?

No, the Department of the Senate, the Department of the House of Representatives and the Department of Parliamentary Services should not continue to be exempt from the operation of the Privacy Act. Any exemptions from the Privacy Act should be based on sound policy grounds and as limited as possible.

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92 See, for example, UPP 5.1(f)(i) and UPP 9.1(i)(i).

PIAC is not aware of any policy justification for the exemption of these parliamentary departments from the Privacy Act.

Proposal 34-5 Subject to Proposal 4-4 (states and territories to enact legislation applying the proposed Unified Privacy Principles and Privacy (Health Information) Regulations), the Privacy Act should be amended to:

(a) apply to all state and territory incorporated bodies, including statutory corporations, except where they are covered by obligations under a state or territory law that are, overall, at least the equivalent of the relevant obligations in the Privacy Act; and

(b) empower the Governor-General to make regulations exempting state and territory incorporated bodies from the coverage of the Privacy Act on public interest grounds.

PIAC strongly supports Proposal 34-5(a) as this will address the gap in coverage that currently exists for state-owned statutory corporations until such time as states and territories enact legislation applying the proposed UPPs to the state and territory public sector agencies.[93]

PIAC supports Proposal 34-5(b) subject to its comments in relation to Proposal 34-6 below.

Proposal 34-6 The Privacy Act should be amended to provide that, in considering whether to exempt state and territory incorporated bodies from the coverage of the Privacy Act, the Minister must:

(a) be satisfied that the state or territory has requested that the body be exempt from the Act;

(b) consider:

(i) whether coverage of the body under the Privacy Act adversely affects the state or territory government;

(ii) the desirability of regulating under the Privacy Act the handling of personal information by that body; and

(iii) whether the state or territory law regulates the handling of personal information by that body to a standard that is at least equivalent to the standard that would otherwise apply to the body under the Privacy Act; and

(c) consult with the Privacy Commissioner about the matters mentioned in paragraphs (ii) and (iii) above.

93 See also the comments above in relation to Proposal 4-4.

Generally, PIAC supports Proposal 34-6, but submits that there should also be a mechanism for making proposed exemptions public and allowing privacy advocates and consumer groups an opportunity to make submissions.

Chapter 35. Small Business Exemption

Proposal 35-1 The Privacy Act should be amended to remove the small business exemption by:

(a) deleting the reference to 'small business operator' from the definition of 'organisation' in section 6C(1) of the Act; and

(b) repealing sections 6D-6EA of the Act.

PIAC strongly supports Proposal 35-1. The small business exemption has always been arbitrary, and there is no justification for its retention. Many small businesses, including internet service providers, real estate agents and debt collectors hold large amounts of personal information that should not be unprotected. The consequences of misuse of such information by small businesses can be just as severe as the consequences of misuse by large organisations.

Any justification of the retention of the exemption based on costs to business fails to consider the existing obligations imposed on a number of funded, non-profit community organisations to comply with privacy laws. For example, PIAC is required under several funding agreements with the Commonwealth Government to comply with the Privacy Act. It receives no additional income to cover the additional cost of ensuring compliance.

But for such funding obligations, many of the non-profit community organisations would fall within the current small business exemption and yet are required to and do comply with privacy laws. The cost to them is similar to the cost that would be imposed on currently exempt small business and these organisations gain no tax or other benefit from business costs.

Removal of the exemption will bring Australia into line with other comparable overseas jurisdictions including the United Kingdom, Canada and New Zealand. This may assist in achieving EU adequacy, and facilitate trade with EU organisations.

Proposal 35-2 Before the proposed removal of the small business exemption from the Privacy Act comes into effect, the Office of the Privacy Commissioner should provide support to small businesses to assist them in understanding and fulfilling their obligations under the Act, including by:

(a) establishing a national small business hotline to assist small businesses in complying with the Act;

(b) developing educational materials – including guidelines, information sheets, fact sheets and checklists – on the requirements under the Act.

(c) developing and publishing templates for small businesses to assist in preparing Privacy Policies, to be available electronically and free of charge; and

(d) liaising with other Australian Government agencies, state and territory authorities and representative industry bodies to conduct programs to promote an understanding and accepting of the privacy principles.

PIAC is concerned that Proposal 35-2 may be interpreted as making the removal of the small business exemption contingent on the provision of support and advice by the OPC to small business; that is, the exemption will not be removed until such time as this support and advice has been provided. This could delay the removal of the exemption (and other amendments to the Act) indefinitely and would be inappropriate and unjustifiable. While PIAC supports the requirement in Proposal 35-2 that the for OPC provide advice and support to small business, PIAC would prefer that a specific time frame be set in the legislation, for example, the exemption is to take effect within three months after the enactment of the amended Privacy Act. The time delay between enactment and effect should be no more than 12 months.

Chapter 36. Employee Records Exemption

Proposal 36-1 The Privacy Act should be amended to remove the employee records exemption by repealing section 7B(3) of the Act.

PIAC strongly supports Proposal 36-1. Employee records should be given the same protection as any other form of personal information, as well as the same protection afforded to public sector employees. Frequently, these records include information of a highly personal and sensitive nature such as information about an employee's health, previous criminal charges, financial details and the results of pre-employment psychological testing. Employees generally have little or no choice about providing this information to their employers and should be entitled to have the information protected.

Like the small business exemption the employee records exemption remains a sticking point in achieving an assessment of 'adequacy' that would facilitate the transfer of employee information between Australia and EU countries. It is also likely to be an obstacle to any similar assessments under the privacy laws of other countries and under other privacy instruments such as the 2005 APEC Privacy Guidelines.

Proposal 36-2 The Privacy Act should be amended to provide that an agency or organisation may deny a request for access to evaluative material, disclosure of which would breach an obligation of confidence to the supplier of the material. 'Evaluative material' for these purposes means evaluative or opinion material compiled solely for the purpose of determining the suitability, eligibility or qualifications of the individual concerned for employment, appointment, the award of a contract, scholarship, honour or other benefit.

PIAC opposes an amendment that would allow an agency or organisation to deny a request for access to all evaluative material. There are very good reasons why current employees should be able to access evaluative records such as performance reviews, referee reports and employment references obtained in respect of promotion and similar internal employment processes. PIAC agrees with the Legal Aid New South Wales that 'many workers have concerns about the adverse effects of unfair referee reports that may be an obstacle to continued employment'.[94] Evaluative records may also provide evidence of discrimination against employees on the basis of such characteristics as age, race, sex, disability and family responsibilities.

94 Legal Aid Commission of New South Wales, Submission PR 107, 15 January 2007.

For these reasons, any exceptions to the privacy principles in relation to evaluative records should be tightly contained. PIAC notes that Proposed UPP 9.1(e) provides for an exception to the Access Principle where 'providing access would reveal the intentions of the organisation in relation to negotiations with the individual in such a way as to prejudice those negotiations'. This would appear to be sufficient to address any concerns employers might have about having to grant employees access to evaluative material. PIAC can see no reason for an additional provision denying a request for access to such material. In any event, the proposed provision is confusing in that it seeks to use 'breach of confidence' type provisions, which are at odds with the rest of the Act.

Chapter 37. Political Exemption

Proposal 37-1 The Privacy Act should be amended to remove the exemption for registered political parties and the exemption for political acts and practices by:

(a) deleting the reference to a 'registered political party' from the definition of 'organisation' in section 6C(1) of the Act;

(b) repealing section 7C of the Act; and

(c) removing the partial exemption that is currently applicable to Australian Government ministers in section 7(1) of the Act.

PIAC strongly supports Proposal 37-1. Political parties and Government Ministers should be subject to the same requirements in relation to the handling of personal information as the wider community. This exemption has effectively allowed the major political parties to develop extensive databases containing information about their constituents.[95] Constituents have no right to access the information held about them or to correct that information if it is inaccurate. Given that some of the databases contain information about the political views of constituents, ethnicity and religion, this is particularly disturbing. In addition, there is potential for information collected from constituents for the purpose of seeking assistance to be used for a purpose other than this: to advance the interests of the political party.

The unregulated operation of these political databases can diminish public confidence in the democratic process, discourage constituents from contacting their local Member of Parliament about issues of concern, and distort the political process by skewing it in favour of swinging voters. The proposal to remove the exemption should result in greater transparency and accountability in the way that political parties and their representatives handle personal information.

Proposal 37-2 The Privacy Act should be amended to provide that the Act does not apply to the extent, if any, that it would infringe any constitutional doctrine of implied freedom of political communication.

PIAC supports Proposal 37-2.

Proposal 37-3 Before the proposed removal of the exemptions for registered political parties and for political acts and practices from the Privacy Act comes into effect,

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95 For example, the Coalition's database, Electrac, and the Australian Labor Party's database, Feedback. See further, Peter Van Onselen and Wayne Errington: 'Electoral Databases: Big Brother or Democracy Unbound' (2004) The Australian Journal of Political Science, 39(2) 349–366.

the Office of the Privacy Commissioner should develop and publish guidance to registered political parties and others to assist them in understanding and fulfilling their obligations under the Act.

PIAC supports Proposal 37-3, subject to the reservations that expressed above in relation to Proposal 35-2 about the timing of the removal of the exemption. As with the removal of the small business exemption, any delay in the removal of the exemption taking effect should be strictly limited and set out in the amending legislation.

Chapter 38. Media Exemption

Proposal 38-1 The Privacy Act should be amended to define 'journalism' as the collection, preparation for dissemination or dissemination of the following material for the purpose of making it available to the public:

(a) material having the character of news, current affairs or a documentary; or

(b) material consisting of commentary or opinion on, or analysis of, news, current affairs or a documentary.

PIAC supports Proposal 38-1. The absence of a definition of 'journalism' from the Act has allowed the media exemption to be interpreted far too broadly, to cover material like Infotainment, entertainment or advertising. The proposed definition will limit the scope of the exemption to genuine news and current affairs journalism.

Proposal 38-2 In consultation with the Australian Communications and Media Authority and peak media representative bodies, the Office of the Privacy Commissioner should establish criteria for assessing the adequacy of media privacy standards for the purposes of the media exemption.

PIAC supports Proposal 38-2. The fact that a media organisation is 'publicly committed' to observe privacy standards is meaningless if those standards are inadequate. The establishment of criteria to assess the adequacy of media privacy standards will provide for more transparent and independent assessment of media privacy standards. Criteria should include effective enforcement powers and sanctions as well as measures to protect the privacy of children and young people.

Proposal 38-3 The Office of the Privacy Commissioner should issue guidelines containing the criteria for assessing the adequacy of media privacy standards established under Proposal 38-2.

PIAC would prefer that the guidelines suggested in Proposal 38-3 be in the form of binding rules, rather than non-binding guidelines.

Proposal 38-4 Section 7B(4)(b)(i) of the Privacy Act should be amended to provide that the standards must 'deal adequately with privacy in the context of the activities of a media organisation (whether or not the standards also deal with other matters)'.

PIAC supports Proposal 38-4.

Proposal 38-5 The Office of the Privacy Commissioner should issue guidance to clarify that the term 'publicly committed' in section 7B(4) of the Privacy Act requires both:

(a) express commitment by a media organisation to observe privacy standards that have been published in writing by the media organisation or a person or body representing a class of media organisations; and

(b) conduct by the media organisation evidencing commitment to observe those standards.

PIAC supports Proposal 38-5. Express commitment to observe privacy standards is meaningless if a media organisation engages in conduct that ignores these standards. PIAC has seen many instances of media organisations that profess to be committed to specific privacy standards flagrantly and repeatedly breaching these standards (and section 11 of the Children (Criminal Proceedings) Act 1987 (NSW)) by identifying children and young people involved in criminal proceedings in New South Wales.[96]

Chapter 39. Other Private Sector Exemptions

There are no proposals or questions in this chapter and PIAC has nothing to add.

Chapter 40. New Exemptions

Question 40-1 Should the Australian Government request that the Standing Committee of Attorney's General consider the regulation of private investigators and the impact of federal, state and territory privacy and related laws on the industry?

Yes, there is a definite need for greater clarity about the coverage of private investigators and they should not be exempt.

Question 40-2 Should the Privacy Act or other relevant legislation be amended to provide exemptions or exceptions applicable to the operation of alternative dispute resolution (ADR) schemes? Specifically, should the proposed:

(a) 'Specific Notification' principle exempt or except ADR bodies from the requirement to inform an individual about the fact of collection of personal information, including unsolicited personal information, where to do so would produce an obligation of privacy owed to a party to the dispute, or could cause safety concerns for another individual;

(b) 'Use and Disclosure' principle authorise the disclosure of personal and sensitive information to ADR bodies for the purpose of dispute resolution; and

96 For example, Chanel 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.

(c) 'Sensitive Information' principle authorise the collection of sensitive information without consent by an ADR body where necessary for the purpose of dispute resolution?

PIAC has no comment at this stage.

Part F – Office of the Privacy Commissioner

Chapter 41. Overview - Office of the Privacy Commissioner

There are no proposals or questions in this chapter and PIAC has nothing to add.

Chapter 42. Facilitating Compliance with the Privacy Act

There are no proposals or questions in this chapter and PIAC has nothing to add.

Chapter 43. Structure of the Office of the Privacy Commissioner

Proposal 43-1 The Privacy Act should be amended to change the name of the 'Office of the Privacy Commissioner' to the 'Australian Privacy Commission'.

PIAC supports Proposal 43-1. This would distinguish the Federal Privacy Commissioner from his or her state and territory counterparts, thus reducing confusion for consumers when making complaints. Moreover, it is a more appropriate name for the office to have in the context of its function of engaging in the international privacy arena.

Finally, PIAC notes that that uses the term 'Australian' would be more consistent with the names given to other Federal regulators, such as the Australian Competition and Consumer Commission (**ACCC**) and the Australian Securities and Investments Commission (**ASIC**).

Proposal 43-2 Part IV, Division 1 of the Privacy Act should be amended to provide for the appointment by the Governor-General of one or more Deputy Privacy Commissioners. The Act should provide that, subject to the oversight of the Privacy Commissioner, the Deputy Commissioner may exercise all the powers, duties and functions of the Privacy Commissioner under this Act – including a power conferred by section 52 and a power in connection with the performance of the function of the Privacy Commissioner set out in section 28(1)(a) – or any other enactment.

PIAC supports Proposal 43-2. If the ALRC's proposed reforms are implemented, the Privacy Commissioner's powers, duties and functions will increase in quantity and complexity. It will be important to have one or more Deputy Privacy Commissioners who can also carry out these powers, duties and functions.

The existence of Deputy Privacy Commissioners may also allow for a greater focus on the educative and advocacy roles of the Privacy Commissioner, which have been taken a back seat to complaint handling in recent years. Multiple statutory officers will allow for greater separation of the functions of the Office, thus avoiding perceived conflicts between these functions.

PIAC particularly welcomes the proposal for Deputy Privacy Commissioners to be able to exercise the power to make determinations under section 52 of the Act. In PIAC's view, this power is fundamental to

the effective operation of the Act and the fact that it has been so rarely used to date is a matter of great concern.[97]

Proposal 43-3 Section 29 of the Privacy Act should be amended to provide that the Privacy Commissioner must have regard to the objects of the Act set out in Proposal 3-3 in the performance of his or her functions and the exercise of his or her powers.

PIAC supports Proposal 43-3. This will lend weight to the objects clause and facilitate statutory interpretation. PIAC agrees with the Australian Privacy Foundation's submission to IP 31 that successive Privacy Commissioners appear to have interpreted section 29(a) of the Act as limiting their ability to perform the role of public advocate and champion of privacy.[98] Requiring the Privacy Commissioner to have regard to the proposed objects of the Act, which include promoting the protection of individual privacy[99], should lead to a greater focus on these roles.

Proposal 43-4 Section 82 of the Privacy Act should be amended to make the following changes in relation to the Privacy Advisory Committee:

(a) require the appointment of a person to represent the health sector;

(b) expand the number of members on the Privacy Advisory Committee, in addition to the Privacy Commissioner, to not more than seven; and

(c) replace 'electronic data-processing' in section 82(7)(c) with 'information and communication technologies'.

PIAC supports Proposal 43-4.

Proposal 43-5 The Privacy Act should be amended to empower the Privacy Commissioner to establish expert panels at his or her discretion to advise the Privacy Commissioner.

PIAC supports Proposal 43-5. If the ALRC's proposed reforms are implemented, the Privacy Commissioner will have the function of developing guidance materials in a range of highly specialised and complex areas. These will include: new and developing technologies in Proposal 7-5; a statutory cause of action for invasion of privacy in Proposal 5-4; compliance with the proposed Openness Principle in Proposal 21-3; and destruction of personal information in Proposals 25-5 and 25-6. Temporary or standing panels of persons with expertise in these areas would be of great assistance to the Privacy Commissioner in formulating this guidance, especially where the relevant expertise may not be located within OPC itself.

Chapter 44. Powers of the Office of the Privacy Commissioner

Proposal 44-1 The Privacy Act should be amended to delete the word 'computer' from section 27(1)(c) of the Privacy Act.

PIAC supports Proposal 44-1. This will broaden the Commissioner's research and monitoring function to cover all technologies.

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97 See further the comments in relation to Chapter 45.

98 Australian Privacy Foundation, Submission PR 167, 2 February 2007.

99 Australian Law Reform Commission, Review of Australian Privacy Law, Discussion Paper 72 (2007) Proposal 3-4(b).

Proposal 44-2 The Privacy Act should be amended to reflect that where guidelines are issued by the Privacy Commissioner are binding, they should be renamed 'rules'. For example, the following should be renamed to reflect that a breach of the rules is an interference with privacy under section 13 of the Privacy Act:

(a) Tax File Number Guidelines issued under section 17 of the Privacy Act should be renamed Tax File Number Rules;

(b) Medicare and Pharmaceutical Benefits Programs Privacy guidelines (issued under section 135AA of the National Health Act 1953 (Cth) should be renamed the Medicare and Pharmaceutical Benefits Programs Privacy Rules;

(c) Data-Matching Program (Assistance and Tax) Guidelines (issued under section 12 of the Data-matching Program (Assistance and Tax) Act 1990 (Cth) should be renamed the Data-Matching Program (Assistance and Tax) Rules; and

(d) Guidelines for National Privacy Principles about genetic information should be renamed Genetic Information Privacy Rules.

PIAC supports Proposal 44-2.

Proposal 44-3 Following the adoption of Proposal 19-1 to require agencies to produce and publish Privacy Policies, the Privacy Act should be amended to remove the requirement in section 27(1)(g) to maintain and publish the Personal Information Digest.

PIAC supports Proposal 44-3. The Information Digest would not seem necessary if agencies are required to produce a Privacy Policy pursuant to the 'Openness' principle and to take reasonable steps to make this Policy available to individuals electronically or in hard copy.

Proposal 44-4 The Privacy Act should be amended to empower the Privacy Commissioner to:

(a) direct an agency or organisation to provide to the Privacy Commissioner a privacy impact assessment in relation to a new project or development that the Privacy Commissioner considers may have a significant impact on the handling of personal information; and

(b) report to the Minister and agency or organisation's failure to comply with such a direction.

Privacy Impact Assessments (**PIAs**) are a crucial aspect of proactive privacy regulation. They can prevent privacy intrusive projects from being implemented, and more importantly, require agencies and organisations to give active consideration to the importance of privacy compliance in the development of laws and programs.

Proposal 44-4 does not go far enough. In PIAC's view, PIAs should be considered where a project or development has the potential to significantly impact on privacy generally, rather than just on the handling of personal information. For example, a project that involves individuals being filmed or photographed without their consent may not involve the handling of their personal information, but may

still impact significantly on their privacy. If the Privacy Act is to be amended to recognise a general cause of action for invasion of privacy, this wider notion of privacy needs to be considered in relation to PIAs.

It should be mandatory for agencies and organisations to provide and publish PIAs for all new projects and developments that have the potential to significantly impact on privacy. It should not be left up to the Privacy Commissioner to 'direct' that a PIA be carried out. This assumes that the Commissioner will have some advance knowledge of the proposed project or development. It would not be difficult for an agency or organisation to limit publicity and information about new projects or developments, thus circumventing a PIA direction. Indeed, there will often be circumstances in which an agency or organisation seeks to keep the development confidential for business or political reasons. Moreover, if the Commissioner is poorly resourced or giving priority to other functions such as complaint handling, it is not difficult to imagine the function of directing PIAs falling by the wayside.

To ensure transparency and accountability, copies of PIAs should be provided to the Privacy Commissioner and made available to the public.

Proposal 44-5 The Office of the Privacy Commissioner should develop Privacy Impact Assessment Guidelines tailored to the needs of organisations.

PIAC supports Proposal 44-5. OPC guidelines could provide a useful template for PIAs and set out clearly the matters that OPC feels should be addressed in a PIA.

Proposal 44-6 The Privacy Act should be amended to empower the Privacy Commissioner to conduct audits of the records of personal information maintained by organisations for the purpose of ascertaining whether the records are maintained according to the proposed Unified Privacy Principles, Privacy Regulations, Rules and any privacy code that binds the organisation.

PIAC strongly supports Proposal 44-6. A general audit power would greatly increase public confidence in the OPC and give the legislation some badly needed 'teeth'. It would also provide an incentive for more businesses to comply with the legislation.

However, just because OPC has power to audit doesn't necessarily mean that it will audit. In the past, the ability of the OPC to carry out audits has depended very much on the whether it has had adequate funding.[100] The Government should ensure that the OPC is funded at a level that allows it to implement a vigorous audit program. Spot-auditing powers should be supplemented by private sector organisations and agencies also having to audit and report on their own compliance with the Act. This is consistent with Corporations Act 2001 (Cth) model of financial reporting and audits, which includes an obligation on corporations to self-audit, to report periodically to ASIC and be subject to audit by ASIC.

Audits should include review of the agency's or organisation's privacy policy to ensure that it does in fact meet the specifications set out in UPP 4.1 (see the comments above in relation to Proposal 21-3).

Proposal 44-7 The Office of the Privacy Commissioner should publish on its website a list of all the Privacy Commissioner's functions, including those functions that arise under other legislation.

PIAC supports Proposal 44-7.

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100 Office of the Privacy Commissioner, The Operation of the Privacy Act Annual Report: 1 July 2005-30 June 2006 (2006) 43.

Proposal 44-8 The Privacy Act should be amended to empower the Privacy Commissioner to refuse to accept an application for a public interest determination where the Privacy Commissioner is satisfied that the application is frivolous, vexations, misconceived or lacking in merit.

It is a drain on the resources of the Privacy Commissioner to have to consider all applications for public interest determinations that come before it. PIAC agrees that the Commissioner should have the discretion to refuse to accept applications for public interest determinations where they are frivolous, misconceived or vexatious. These are factors that are usually obvious on the face of an application. However, it is difficult to see how the Commissioner could make a decision that an application for a public interest determination is 'lacking in merit' without first accepting the application and conducting some preliminary investigations.

Any decision to refuse to accept an application should be subject to judicial review, and applicants should be fully advised of this.

Proposal 44-9 Part IIIAA of the Privacy Act should be amended to specify that:

(a) privacy codes approved under Part IIIAA operate in addition to the proposed Unified Privacy Principles (UPPs) and do not replace those principles.

(b) a privacy code may provide guidelines or standards on how any one or more of the proposed UPPs should be applied, or are to be complied with, by the organisation bound by the code, as long as such guidelines or standards contain obligations that are at least equivalent to those under the Act.

PIAC supports Proposal 44-9(a) to ensure Codes operate in addition to the privacy principles rather than replacing them. PIAC also supports Proposal 44-9(b): that privacy principles should operate as the base standard, with Codes simply filling in detail where necessary. This will ensure that the privacy principles are not undermined, and will reduce fragmentation, complexity and confusion in privacy regulation.

Proposal 44-10 Part IIIAA of the Privacy Act should be amended to empower the Privacy Commissioner to:

(a) request the development of a privacy code to be approved by the Privacy Commissioner pursuant to s 18BB; and

(b) develop and impose a privacy code that applies to designated agencies and organisations.

PIAC supports Proposal 44-10. This will enable the Privacy Commissioner to take a more proactive role in privacy regulation where there is a need for detailed regulation in specific sectors or technologies. However, if this function is to carried out effectively it will be essential to ensure that the Privacy Commissioner is adequately funded.

Chapter 45. Investigation and Resolution of Privacy Complaints

Proposal 45-1 Section 41(1) of the Privacy Act should be amended to provide that, in addition to existing powers not to investigate, the Commissioner may decide not to

investigate further, an act or practice about which a complaint has been made under section 36, or which the Commissioner has accepted under section 40(1B), if the Commissioner is satisfied that:

(a) the complainant has withdrawn the complaint; or

(b) the complainant has not responded to the Commissioner for a specified period following a request by the Commissioner for a response in relation to the complaint; or

(c) an investigation, or further investigation of the act or practice is not warranted having regard to the circumstances.

PIAC supports Proposal 45-1(a) and (b). However, PIAC is concerned that (c) gives the Commissioner an extremely wide discretion to decide not to investigate (or continue to investigate) acts or practices that are the subject of complaints. The expression 'not warranted having regard to the circumstances' could feasibly justify a decision by the Commissioner to decline to investigate a complaint in circumstances where the Commissioner lacks the resources to do so, or where the respondent is not contactable. The Commissioner already has a discretion under section 41 to not investigate (or to not investigate further) in a number of circumstances, including where complaints are frivolous, vexatious, misconceived or lacking in substance.[101] There is no justification for an added discretion, especially in the broad terms proposed.

In other statutes that provide for a similar discretion to (c), there is usually also provision for the complainant to require that the complaint be referred to a tribunal.[102] However, this does not appear to be envisaged by the ALRC in relation to Proposal 45-1, nor is there any provision for it in the existing Act.

In paragraph 45.11, the ALRC refers to the need to make a 'compromise between addressing individual complaints and addressing systemic issues'. The proposed compromise is to give the Commissioner 'more discretion not to investigate individual complaints in certain circumstances'. PIAC agrees that there is a need for systemic issues to be addressed in privacy regulation. However, this should not be at the expense of individual complaints. In PIAC's experience, many systemic issues only become evident as a result of a number of individual complaints about the same or similar issues.

Proposal 45-2 The Privacy Act should be amended to empower the Privacy Commissioner to:

(a) decline to investigate a complaint where the complaint is being handled by an approved external dispute resolution scheme; or

(b) decline to investigate a complaint that would be more suitably handled by an approved external dispute resolution scheme, and to refer that complaint to the external dispute resolution scheme with a request for investigation.

PIAC supports Proposal 45-2 so long as the external dispute resolution scheme (EDR) has been approved by the OPC and there are appropriate review and appeal mechanisms in place (consistent with those that are proposed for complaints that are handled by the OPC).

101 Privacy Act 1988 (Cth) s 41(1).

102 See, for example, Anti-Discrimination Act 1977 (NSW) s 92(2).

OPC should publish on its website a list of approved EDR schemes, in order to increase transparency and awareness in the referral process. Criteria for approval of an EDR scheme should include a mechanism for reporting to the OPC on systemic issues and serious misconduct.[103]

Proposal 45-3 Section 99 of the Privacy Act should be amended to empower the Privacy Commissioner to delegate to a state or territory authority all or any of the powers, including a power conferred by section 52, in relation to complaint handling conferred on the Commissioner by the Privacy Act.

PIAC supports Proposal 45-3, subject to there being a mechanism for reporting to the OPC on systemic issues and serious misconduct and no loss of remedies/sanctions available to referred complainants.

Proposal 45-4 Sections 27(1)(a) and (ab) of the Privacy Act should be amended to make it clear that the Privacy Commissioner's functions in relation to complaint handling include:

(a) to receive complaints about an act or practice that may be an interference with the privacy of an individual;

(b) to investigate the act or practice about which a complaint has been made; and

(c) where the Commissioner considers it appropriate to do so and at any stage after acceptance of the complaint, to endeavour, by conciliation, to effect a settlement of the matters that gave rise to the complaint or to make a determination in respect of the complaint under section 52.

PIAC supports Proposal 45-4.

Proposal 45-5 The Privacy Act should be amended to include new provisions dealing expressly with conciliation. These provisions should give effect to the following:

(a) If, at any stage after receiving the complaint, the Commissioner considers it reasonably possible that the complaint be conciliated successfully, he or she must take all reasonable steps to conciliate the complaint.

(b) Where, in the opinion of the Commissioner, all reasonable attempts to settle the complaint by conciliation have been made and the Commissioner is satisfied that there is no reasonable likelihood that the complaint will be resolved by conciliation, the Commissioner must notify the complainant and the respondent that conciliation has failed and the complainant or respondent may require that the complaint be resolved by determination.

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103 Australian Securities and Investments Commission, Approval of External Complaints Resolution Schemes: ASIC Policy Statement 139 (1999) [135.59].

(c) Evidence of anything said or done in the course of a conciliation is not admissible in a determination hearing or any enforcement proceedings relating to the complaint, unless all the parties to the conciliation otherwise agree.

PIAC supports Proposal 45-5(a), subject to the Act also specifying a general time limit for the conciliation process. Undue delay in the conciliation process is frustrating for complainants and respondents and can deter complainants from continuing with their complaint. Further, delays in conciliation can result in the parties hardening their positions, thereby reducing the likelihood of a successful conciliation. It can also impact adversely on the prospects of success of the complainant on review, as evidence becomes 'stale' and witnesses may no longer be available or able to remember crucial events.

PIAC supports Proposal 45-5(b). A major problem with the current regulatory system has been the failure of successive Privacy Commissioners to make determinations under section 52 and the inability of plaintiffs or defendants to compel them to do so. If the plaintiff or respondent can require that a matter be resolved by determination, the number of determinations made by the Privacy Commissioner should increase and there is at last potential for a solid body of jurisprudence to develop about the interpretation of the provisions of the Act. This will be of assistance to the OPC in carrying out its educative functions. It should also facilitate the conciliation process, as parties will be able to negotiate against a background of awareness of likely damages and other outcomes. In the past, PIAC has found it difficult to advise its clients about these matters, because of the almost complete absence of determinations on key provisions of the Act.

PIAC supports Proposal 45-5(c).

Proposal 45-6 Section 52 of the Privacy Act should be amended to empower the Privacy Commissioner to make an order in a determination that an agency or respondent must take specified action within a specified period for the purpose of ensuring compliance with the Act.

PIAC strongly supports Proposal 45-6. However, it will be important to ensure that there is some 'follow-up' to check that the agency or organisation has actually taken the specified action within the specified time. This could potentially be achieved through the audit process.

Proposal 45-7 The Privacy Act should be amended to provide that a complainant or respondent can apply to the Administrative Appeals Tribunal for a merits review of a determination made by the Privacy Commissioner under section 52 and the current review rights set out in section 61 should be repealed.

PIAC strongly supports Proposal 45-7. This will provide a quicker, cheaper and more accessible alternative to judicial review by way of the Administrative Decision (Judicial Review) Act 1977 (Cth). The restrictions on the ability of parties to seek a merits review from the Administrative Appeals Tribunal (**AAT**) have long been a major deficiency in the Privacy Act. Merits review will increase transparency and accountability of the OPC and will facilitate the growth of a body of jurisprudence.

Proposal 45-8 The Office of the Privacy Commissioner should prepare and publish a document setting out its complaint-handling policies and procedures.

PIAC supports Proposal 45-8. The document should include reference to case notes and should include guidelines about confidentiality during the investigation and conciliation process.

Undue delay in the complaint resolution process has been a common and very frustrating feature of most of the privacy cases in which PIAC has acted. In one matter, the respondent took over six months to respond to the client's complaint. It is therefore important that any document setting out complaint-handling policies and procedures also specify clear time frames for various steps in the investigation and conciliation process. There should also be penalties or some other adverse consequences for undue delay, ideally spelt out in the legislation.

Proposal 45-9 Section 38B(2) of the Privacy Act should be amended to allow a class member to withdraw from any representative complaint at any time if the class member has not consented to be a class member.

PIAC supports Proposal 45-9.

Proposal 45-10 Section 42 of the Privacy Act should be amended to empower the Privacy Commissioner to make preliminary inquiries of third parties as well as the respondent.

PIAC supports Proposal 45-10. This will ensure that investigations by the Privacy Commissioner are as comprehensive as possible. However, third parties should be made aware of the importance of confidentiality in the investigation and conciliation process.

Proposal 45-11 Section 46(1) of the Privacy Act should be amended to empower the Privacy Commissioner to compel parties to a complaint, and any other relevant person, to attend a compulsory conference.

PIAC supports Proposal 45-11, subject to all parties and persons who attend being made aware of the importance of confidentiality.

Proposal 45-12 Section 69(1) and (2) of the Privacy Act should be deleted, which would allow the Privacy Commissioner, in the context of an investigation of a privacy complaint, to collect personal information about an individual who is not the complainant.

PIAC supports Proposal 45-12. This is important to ensure that the investigation process is as comprehensive as possible.

Proposal 45-13 The Privacy Act should be amended to provide that the Privacy Commissioner may direct that a hearing for a determination may be conducted without oral submissions from the parties if:

(a) the Privacy Commissioner considers that the matter could be determined fairly on the basis of written submissions by the parties; and

(b) the complainant and respondent consent to the matter being determined without oral submissions.

PIAC supports Proposal 45-13.

Chapter 46. Enforcing the Privacy Act

Proposal 46-1 The Privacy Act should be amended to empower the Privacy Commissioner to

(a) issue a notice to comply to an agency or organisation following an own motion investigation, where the Commissioner determines that the agency or organisation has engaged in conduct constituting an interference with the privacy of an individual;

(b) prescribe in the notice that an agency or organisation must take specified action within a specified period for the purpose of ensuring compliance with the Privacy Act; and

(c) commence proceedings in the Federal Court or Federal Magistrate's Court for an order to enforce the notice.

PIAC supports Proposal 46-1. To date, own-motion investigations have had limited value as a compliance tool because of the Commissioner's inability to enforce remedies following such investigations. The proposed amendments will greatly enhance the ability of the Commissioner to address systemic interferences with privacy.

There should also be a requirement for the results of own-motion investigations to be made public in some way, eg, by being reported in OPC case notes, or by being tabled in Parliament. It would also be helpful to have procedures in place to enable privacy and consumer groups to intervene in own-motion investigations where appropriate.

Proposal 46-2 The Privacy Act should be amended to allow a civil penalty to be imposed where there is a serious or repeated interference with the privacy of an individual. The Office of the Privacy Commissioner should develop and publish enforcement guidelines setting out the criteria upon which a decision to impose a civil penalty is made.

PIAC strongly endorses Proposal 46-2. The threat of civil penalties is likely to provide a strong incentive for compliance. However, to be effective, it will be important to ensure that the penalties that are imposed are not simply nominal in amount. For example, a penalty of $1,000 is unlikely to deter a large, well-resourced respondent from engaging in future interferences with privacy. Penalties should be commensurate with the seriousness of the breach and the nature of the repeated interference. Penalties should also reflect the principle that an offender should not benefit financially from the offence.

Chapter 47. Data Breach Notification

Proposal 47-1 The Privacy Act should be amended to include a new Part on data breach notification to provide as follows:

(a) An agency or organisation is required to notify the Privacy Commissioner and affected individuals when specified personal information has been, or is reasonably believed to have been, acquired by an unauthorised person and the

agency, organisation or Privacy Commissioner believes that the unauthorised acquisition may give rise to a real risk of serious harm to any affected individual.

(b) Any agency or organisation is not required to notify any affected individual where:

(i) the specified information was encrypted adequately;

(ii) the specified information was acquired in good faith by an employee or agent of the agency or organisation where the agency or organisation was acting for a purpose permitted by the proposed Unified Privacy Principles (provided that the personal information is not used or subject to further unauthorised disclosure); or

(iii) the Privacy Commissioner does not consider that notification would be in the public interest.

(c) Failure to notify the Privacy Commissioner of a data breach as required by the Act may attract a civil penalty.

PIAC strongly supports Proposal 47-1. The Privacy Commissioner should provide guidance on the circumstance in which unauthorised acquisition may give rise to a real risk of serious harm to any affected individual. Such guidance should make it clear that serious harm is not limited to identity theft and fraud, but can also include potential discrimination or other damage where, for example, sensitive medical information is released.

Part H – Health Services and Research

Chapter 56. Regulatory Framework for Health Information

In respect of the issue of national consistency, the ALHR refers back to its proposal in Chapter 4 that the 'Privacy Act be amended to apply to the exclusion of state and territory laws dealing specifically with the handling of personal information in the private sector', and then makes specific reference to health privacy laws 'to the extent they apply to organisations'. While this is a rational approach, the ALRC does not consider the issue of the handling of health information under state- or territory-funding arrangements whereby the organisation delivering sub-contracted services is quite properly required to comply with the state or territory government agency's privacy obligations. The imposition on contractors of the privacy obligations of the principal is an important protection for consumers and one that needs to be effectively provided for in reformulating an approach to privacy and health services. As with cross-border data flow, a consumer should be able to expect that his or her provision of health information to a government provider of health or related services is protected by the same rules whether or not some aspect of the service delivery or administration is delivered by a contracted organisation. If there is a breach of the information handling requirements, the consumer should be able to deal with it is as a complaint against the principal, with the principal responsible for dealing with any liability by the contractor.

The exclusion of coverage of organisations by state or territory privacy laws occurring in the context of the imposition of state or territory privacy law obligations through contracting or funding arrangements will mean that there continues to be overlapping obligations for those organisations. While one is imposed by contract and the other imposed by legislation, both are legally binding and important obligations for consumers who may be relying on the state or territory government to protect their health information in particular situations.

The unification of principles should assist to a significant extent.

Proposal 56-1 The Privacy Commissioner should consider delegating the power to handle complaints under the Privacy Act in relation to interference with health information privacy by organisations to state and territory health complaint agencies.

PIAC supports Proposal 56-1. However, consideration needs to be given to ensure that there are consistent approaches to complaint handling, including timing and resourcing across all jurisdictions. It would be unfortunate if delegation to achieve the benefits of local complaint resolution resulted in differential standards of response and assistance between different states and territories.

It will also be important to ensure that consumers are provided with clear information about how the complaint process works in respect of delegated complaint handling. In particular, complainants need to understand what their appeal or review rights are and that these are unaffected by the delegation.

Proposal 56-2 Health information should continue to be regulated under the general provisions of the Privacy Act and the proposed Unified Privacy Principles (UPPs). Amendments to the proposed UPPs that relate specifically to the handling of health information should be promulgated in regulations under the Privacy Act—the Privacy (Health Information) Regulations.

PIAC supports Proposal 56-2.

Proposal 56-3 The Office of the Privacy Commissioner should publish a document bringing together the proposed UPPs and the amendments set out in the Privacy (Health Information) Regulations. This document will contain a complete set of the proposed UPPs as they relate to health information.

PIAC supports Proposal 56-3, and notes the importance of consultation with stakeholders, including health consumer, privacy and disability advocacy groups, in the development of the Privacy (Health Information) Regulations.

Proposal 56-4 The Office of the Privacy Commission—in consultation with the Australian Government Department of Health and Ageing and other relevant stakeholders—should develop guidelines on the handling of health information under the Privacy Act and the Privacy (Health Information) Regulations.

PIAC supports Proposal 56-4. Again, it will be important to ensure the effective involvement of health consumer, privacy and disability advocacy groups in the development of such guidelines.

Proposal 56-5 The national Unique Healthcare Identifiers (UHIs) scheme and the national Shared Electronic Health Records (SEHR) scheme should be established under specific enabling legislation. The legislation should address information privacy issues, such as:

(a) the nomination of an agency or organisation with clear responsibility for managing the respective systems, including the personal information contained in the systems;

(b) the eligibility criteria, rights and requirements for participation in the UHI scheme and the SEHR scheme by health consumers and health service providers, including consent requirements;

(c) permitted and prohibited uses and linkages of the personal information held in the system;

(d) permitted and prohibited uses of UHIs and sanctions in relation to misuse; and

(e) safeguards in relation to the use of UHIs; for example, that it is not necessary to use a UHI in order to access health records.

PIAC supports Proposal 56-5 and notes the importance of such a system being well described for all health consumers to ensure they are able to understand the purpose, scope and privacy protections in place and the ways in which their health information and the UHI will be used. In line with its comments in respect of the proposed Health Access Card, PIAC submits that the legislative scheme to deal with UHIs and the SEHR must strictly prohibit uses of UHIs by any person, agency or organisation other than in respect of health service delivery and that demanding the disclosure of a person's UHI should be prohibited other than in a strictly defined health service delivery context.

Chapter 57. The Privacy Act and Health Information

Proposal 57-1 The definition of 'health information' in the Privacy Act should be amended to make express reference to information or an opinion about the physical, mental or psychological health or disability of an individual.

PIAC supports Proposal 57-1 on the basis that inappropriate handling of both information or opinions about the 'physical, mental or psychological health or disability of an individual' could seriously compromise the privacy of that individual and result in lasting damage.

Proposal 57-2 The Privacy Act should be amended to define a 'health service' as:

(a) an activity performed in relation to an individual that is intended or claimed (expressly or otherwise) by the individual or the service provider to:

(i) assess, record, maintain or improve the individual's health;

(ii) diagnose the individual's illness, injury or disability; or

(iii) treat the individual's illness, injury or disability or suspected illness, injury or disability; or

(b) a disability service, palliative care service or aged care service; or

(c) the dispensing on prescription of a drug or medicinal preparation by a pharmacist.

PIAC supports Proposal 57-2. The amendments to extend the current definition to include the recording of health information and the express inclusion of disability, palliative care and aged care services are important additions.

PIAC queries whether it is appropriate to simply retain the subjective test in Proposal 57-2(a) or to also add an objective element. At present it appears that the question of whether or not an activity is a health service depends on the subjective intention or claim of the individual or service provider, rather than on any objective assessment of what the activity involves. PIAC submits that consideration should be given to adding an objective test in the alternative:

(a) an activity performed in relation to an individual that is intended or claimed (expressly or otherwise) by the individual or service provider <u>to involve, or that involves</u>:
  (i) assessment, recording, or maintenance of or improvement to the individual's health;
  (ii) diagnosis of the individual's illness, injury or disability; or
  (iii) treatment of the individual's illness, injury or disability or suspected illness, injury or disability; …

In respect of Proposal 57-2(b), PIAC submits that the scope could be slightly broader to ensure organisations that provide a range of services, including disability, palliative care or aged care services, are clearly within the definition by amending the words as follows:

(b) the provision of a disability service, palliative care service or aged care service; …

Agencies and organisations

PIAC is concerned that, in the event that the small business exemption is not removed, consideration needs to be given to and action taken to address the issues raised by the ALRC in paragraphs 57.28–57.34. The lack of comprehensive coverage of small businesses that hold health information needs to be rectified whether or not the small business exemption is removed.

Provision of health services

PIAC supports the approach adopted by the ALRC in paragraphs 57.49–57.54 in respect of the provision of health services and encourage the OPC to work with the health sector to develop appropriate further guidance to overcome perceived barriers to effective information flow.

Consent

PIAC supports the approach to consent adopted by the ALRC in paragraphs 57.87–57.74.

Proposal 57-3 The Privacy (Health Information) Regulations should provide that a health service provider may collect health information from a health consumer, or a person responsible for the health consumer, about third parties without consent when:

(a) the collection of third party's information into a health consumer's social, family or medical history is necessary to enable health service providers to provide a health service directly to the consumer; and

(b) the third party's information is relevant to the family, social or medical history of that consumer.

PIAC supports Proposal 57-3 and prefers this approach over the approach set out in the National Health Privacy Principle 1 of the draft National Health Privacy Code as it constrains from whom the information can be collected. PIAC notes the use of the phrase 'collection of … information into a health consumer's social, family or medical history' and queries whether this could be more clearly expressed as 'the collection of … information is relevant to the health consumer's social, family or medical history and is necessary to enable …'

Collection of family medical history information by insurance companies

PIAC endorses the concerns expressed by the ALRC in respect of collection of family medical history information by insurance companies and the potential for the identity of particular family members to be ascertained. As noted by the OPC and the ALRC in this section, the public policy considerations that apply to health service providers collecting such information do not apply to insurance providers. Insurance providers should be required to comply fully with the UPPs and ensure that any information collected is collected in a way that prevents the potential for identity to be ascertained.

Binding rules established by health or medical bodies

PIAC supports the approach proposed by ALRC in paragraph 57.116.

Question 57-1 Should the proposed Privacy (Health Information) Regulations provide that health information may be collected without consent where it is necessary to provide a health service to the individual and the individual would reasonably expect the agency or organisation to collect the information for that purpose?

PIAC agrees that the Privacy (Health Information) Regulations should provide that information may be collected without consent in this circumstance. However, PIAC notes that health service providers should be encouraged to provide information in an accessible form to health consumers to enable them to better understand the nature, likely scope and need for such collection.

Proposal 57-4 The provisions of National Privacy Principles 2 dealing with the disclosure of health information in the health services context to a person responsible for an individual should be moved to the Privacy (Health Information) Regulations. The proposed regulation should:

(a) be expressed to apply to both agencies and organisations;

(b) provide that an agency or organisation that provides a health service to an individual may disclose health information about the individual to a person who is responsible for the individual if the individual is 'incapable of giving consent' to the disclosure and all the other circumstances currently set out in NPP 2.4 are met;

(c) include a definition of a person 'responsible' for an individual amended to incorporate the term 'authorised representative'; and

(d) refer to 'de factor partner' rather than 'de facto spouse'.

PIAC supports Proposal 57-4.

Proposal 57-5 National Privacy Principle 2.1(ea) on the use and disclosure of genetic information should be moved to the Privacy (Health Information) Regulations and amended to apply to both agencies and organisations. Any use or disclosure under the proposed regulation should be in accordance with binding rules issues by the Privacy Commissioner.

PIAC supports Proposal 57-5.

Proposal 57-6 The Privacy (Health Information) Regulations should provide that, if an organisation denies an individual access to his or her own health information on the ground that providing access would be reasonably likely to pose a serious threat to the life or health of any individual, the:

(a) organisation must advise the individual that he or she may nominate a registered medical practitioner to be given access to the health information;

(b) individual may nominate a registered medical practitioner and request that the organisation provide access to the information to the nominated medical practitioner;

(c) organisation must provide access to the health information to the nominated medical practitioner; and

(d) nominated medical practitioner may assess the grounds for denying access to the health information and may provide the individual with sufficient access to the information to meet the individual's needs if he or she is satisfied that to do so would not be likely to pose a serious threat to the life or health of any individual.

PIAC supports Proposal 57-6 and commends the ALRC on providing an effective mechanism for enabling the use of a professionally and suitably qualified intermediary in respect of disclosure.

PIAC notes that the ALRC is 'interested in receiving feedback on whether an organisation should have the opportunity to object to the individual's choice of nominated medical practitioner before providing access to the individual's health information': paragraph 57.177. It is PIAC's view that an organisation should not need such an opportunity as the Proposal stipulates a medical practitioner. So long as the nominated person is a medical practitioner, the organisation should properly be expected to rely on that person's professional qualifications and registration.

Proposal 57-7 The Privacy (Health Information) Regulations should provide that where a health service practice of business is sold, amalgamated or closed down and a health service provider will not be providing health services in the new practice or business, or the provider dies, the provider, or the legal representative of the provider, must take all reasonable and appropriate steps to:

(a) make individual users of the health service aware of the sale, amalgamation or closure of the health service or the death of the health service provider; and

(b) inform them about proposed arrangements for the transfer or storage of individuals' health information.

PIAC supports Proposal 57-7.

Proposal 57-8 The Privacy (Health Information) Regulations should provide that if an individual:

(a) requests that a health service provider, or the health service provider's legal representative, make the individual's health information available to another health service provider; or

(b) authorises a health service provider to request that another health service provider transfers the individual's health information to the requesting health service provider,

the health service provider must transfer the individual's health information as requested. The health information may be provided in summary form.

PAIC supports Proposal 57-8, but sees no justification for the health information to be provided only in summary form. While PIAC acknowledges that some health information may be extensive, it is surely important for the proper delivery of ongoing health services for the receiving health service provider to be provided with the comprehensive records.

Proposal 57-9 The Privacy (Health Information) Regulations should make express provision for the collection, use and disclosure of health information without consent where necessary for the funding, management, planning, monitoring, improvement or evaluation of a health service where:

(a) the purpose cannot be achieved by the collection, use or disclosure of information that does not identify the individual;

(b) it is impracticable for the agency or organisation to seek the individual's consent before the collection, use or disclosure; and

(c) the collection, use or disclosure is conducted in accordance with rules issued by the Privacy Commissioner.

PIAC supports Proposal 57-9.

PIAC notes and endorses the ALRC's view in respect of 'use of health information without consent for training purposes in some circumstances'—set out in paragraph 57.229—that 'the public interest balance in relation to training activities is not the same as the public interest balance in ensuring the quality and safety of health care' and that no special provision ought to be made for this activity.

Proposal 57-10 The Privacy Act should be amended to empower the Privacy Commissioner to issue rules in relation to the handling of personal information for the funding, management, planning, monitoring, improvement or evaluation of a health service.

PIAC supports Proposal 57-10.

Other issues

An issue that is not clearly addressed and is of particular concern to PIAC is the transfer of medical reports, particularly reports about a person's mental health, between the court system and the corrections system.

Increasingly systems are being developed that enable psychiatric reports to be presented to the courts in criminal matters, particularly in respect of sentencing. In order to ensure the appropriate follow up health care where a person is given a custodial sentence those reports are transferred with the prisoner to the correctional facility. The handling of those health records within the correctional setting is of concern to PIAC.

Chapter 58. Research

Proposal 58-1 The Privacy Commissioner should issue one set of rules under the proposed exceptions to the 'Collection' principle and the 'Use and Disclosure' principle in the Unified Privacy Principles (UPPs) to replace the Guidelines Under Section 95 of the Privacy Act 1988 and the Guidelines Approved Under Section 95A of the Privacy Act 1988.

PIAC supports Proposal 58-1.

Proposal 58-2 The Privacy Act should be amended to extend the existing arrangements relating to the collection, use or disclosure of personal information without consent in the area of the health and medical research to cover the collection, use or disclosure of personal information without consent in human research more generally.

PIAC supports Proposal 58-2, noting the importance of human research in public policy development.

Proposal 58-3 The Privacy Act should be amended to provide that 'research' is any activity, including the compilation or analysis of statistics, subject to review by a Human Research Ethics Committee under the National Statement on Ethical Conduct in Human Research (2007).

PIAC supports Proposal 58-3. However, PIAC is concerned that further consideration needs to be given to human research undertaken by smaller, independent entities or entities that undertake research of this sort as a secondary activity. For such organisations, access to an appropriate Human Research Ethics Committee can be problematic. PIAC submits that some thought could usefully go into options for the creation of a Human Research Ethics Committee in each state and territory to deal with human research proposals from entities that do not have sufficient capacity or need to maintain a standing committee of this sort.

Proposal 58-4 The research exception to the proposed 'Collection' principle and the proposed 'Use and Disclosure' principle should provide that before approving an activity that involves the collection, use or disclosure of sensitive information or the use or disclosure of other personal information without consent, Human Research Ethics Committees must be satisfied that the public interest in the activity outweighs the public interest in maintaining the level of privacy protection provided by the proposed UPPs.

PIAC supports Proposal 58-4. However, PIAC also notes the importance of providing consumers with information about the benefits of health and human research and of ensuring that the benefits flow equitably irrespective of a person's personal, social or financial circumstances. It is not appropriate to enable health or human research on the straight balancing test of public interest of the research versus the public interest in maintaining privacy if the public interest flowing from the research being undertaken is not a publicly available benefit.

Proposal 58-5 The Privacy Commissioner should consult with relevant stakeholders in developing the rules to be issued under the research exceptions to the proposed 'Collection' principle and the proposed 'Use and Disclosure' principle, to ensure that approaches adopted in the rules and the National Statement on Ethical Conduct in Human Research (2007) are compatible.

PIAC supports Proposal 58-5 noting that the stakeholders must properly include consumer representatives from relevant sectors.

Proposal 58-6 The National Statement on Ethical Conduct in Human Research (2007) should be amended to require that, where a research proposal seeks to rely on the research exceptions in the Privacy Act, it must be reviewed and approved by a Human Research Ethics Committee.

PIAC supports Proposal 58-6 and reiterates the concerns set out above in response to Proposal 58-3.

Proposal 58-7 In developing the rules to be issued in relation to research under the proposed 'Collection' principle and the proposed 'Use and Disclosure' principle, the Privacy Commissioner, in consultation with relevant stakeholders, should review the reporting requirements currently imposed on the Australian Health Ethics Committee and Human Research Ethics Committee. Any new reporting mechanism should aim to promote the objects of the Privacy Act, have clear goals and impose the minimum possible administrative burden to achieve those goals.

PIAC supports Proposal 58-7.

Proposal 58-8 The research exception to the proposed 'Collection' principle should state that, despite subclause 2.6, an agency or organisation may collect sensitive information about an individual where:

(a) the collection is necessary for research;

(b) the purpose cannot be served by the collection of information that does not identify the individual;

(c) it is impracticable for the agency or organisation to seek the individual's consent to the use or disclosure;

(d) a Human Research Ethics Committee has reviewed the proposed activity and is satisfied that the public interest in the activity outweighs the public interest in maintaining the level of privacy protection provided by the UPPs; and

(e) the information is collected in accordance with rules issued by the Privacy Commissioner.

Where an agency or organisation collects sensitive information about an individual in accordance with this provision, it must take reasonable steps to ensure that the information is not disclosed in a form that would identify the individual or from which the individual would be reasonably identifiable.

PIAC generally supports Proposal 58-8. However, the inclusion of the word 'reasonable' leaves open the possibility of disclosure of identifiable sensitive information. PIAC cannot see any justification for retaining this term and proposes that this be reworded as follows:

> Where an agency or organisation collects sensitive information about an individual in accordance with this provision, it must take ~~reasonable steps to~~ ensure that the information is not disclosed in a form that would identify the individual or from which the individual would be reasonably identifiable.

Also, PIAC reiterates its concerns above under Proposal 58-4 in respect of the need to ensure that the benefit to be gained by the research is a publicly available benefit.

Proposal 58-9 The research exception to the proposed 'Use and Disclosure' principle should state that despite the other provisions of the 'Use and Disclosure' principle, an agency or organisation may use or disclose personal information where:

(a) the use or disclosure is necessary for research;

(b) it is impracticable for the agency or organisation to seek the individual's consent to the use or disclosure;

(c) a Human Research Ethics Committee has reviewed the proposed activity and is satisfied that the public interest in the activity outweighs the public interest in maintaining the level of privacy protection provided by the UPPs;

(d) the information is used or disclosed in accordance with rules issued by the Privacy Commissioner; and

(e) in the case of disclosure—the agency or organisation reasonably believes that the recipient of the personal information will not disclose the personal information in a form that would identify the individual or from which the individual would be reasonably identifiable.

PIAC generally supports Proposal 58-9. However, the inclusion of the word 'reasonably believes' in (e) leaves open the possibility of disclosure of identifiable sensitive information. PIAC cannot see any justification for retaining this term and proposes that this be reworded as follows:

in the case of disclosure—the agency or organisation has put in place a legally binding requirement that the recipient of the personal information will not disclose the personal information in a form that would identify the individual or from which the individual would be reasonably identifiable

Again, PIAC reiterates its concerns above under Proposal 58-4 in respect of the need to ensure that the benefit to be gained by the research is a publicly available benefit.

Proposal 58-10 The Privacy Commissioner should provide guidance on the meaning of 'not reasonably identifiable'.

PIAC supports Proposal 58-10.

Proposal 58-11 The Privacy Commissioner should address the following matters in the rules to be issued under the research exceptions to the proposed 'Collection' principle and the proposed 'Use and Disclosure' principle:

(a) the process by which a Human Research Ethics Committee should review a proposal to establish a health information database or register for research purposes;

(b) the matters a Human Research Ethics Committee should take into account in considering whether the public interest in establishing the health information database or register outweighs the public interest in maintaining the level of privacy protection provided by the UPPs; and

(c) the fact that, where a database or register is established on the basis of Human Research Ethics Committee approval, that approval does not extend to future unspecified uses. Any future proposed use of the database or register for research would require separate review by a Human Research Ethics Committee.

PIAC supports Proposal 58-11, noting that it will be important to ensure that consumer advocacy groups have a central in the development of such rules.

Proposal 58-12 The Privacy Commissioner should address the following matters in the rules to be issued under the research exceptions to the proposed 'Collection' principle and the proposed 'Use and Disclosure' principle:

(a) the process by which a Human Research Ethics Committee should review a proposal to examine a health information database or register to identify potential participants in research; and

(b) the matters a Human Research Ethics Committee should take into account in considering whether the public interest in allowing the examination of the health information database or register outweighs the public interest in maintaining the level of privacy protection provided by the UPPs.

PIAC supports Proposal 58-12.

Proposal 58-13 Agencies or organisations developing systems or infrastructure to allow the linkage of personal information for research purposes should consult the

Office of the Privacy Commissioner to ensure that the systems or infrastructure they are developing meet the requirements of the Privacy Act.

PIAC supports Proposal 58-13.

Part I – Children, Young People and Adults requiring assistance

Chapter 59. Children, Young People and Privacy

Proposal 59-1 The Australian Government should fund a longitudinal study of the attitudes of Australians, including young Australians, to privacy.

PIAC supports Proposal 59-1. Data from longitudinal studies could be used to inform future government policy about privacy and to ensure that the Act continues to evolve to meet its objectives and remain responsive to community attitudes towards privacy. PIAC notes and commends the current practice of the OPC of undertaking a survey on a regular basis to ascertain attitudes to and awareness of privacy laws and issues. Unlike cross-sectional studies that only investigate difference between individuals, longitudinal studies examine change within individuals over a period of time.[104] This could shed light on whether the attitudes of members of Generation Y to online privacy issues remain fixed over time, or whether they shift with growing maturity. Longitudinal studies could also be used to trace the extent to which any changes to the privacy regulation framework impact upon attitudes to privacy.

In addition, PIAC notes that a number of the proposed amendments to the Act will require a consideration of current attitudes of Australians to privacy and the acceptable level of interference with privacy. For example, a plaintiff who is seeking to bring an action for invasion of privacy would have to show that they had a 'reasonable expectation of privacy' in the circumstances.[105] It will therefore be important to have accurate, up-to-date data on community attitudes to privacy.

To be effective, a longitudinal study would have to be adequately funded by the Australian Government and representative of the entire Australian population, including participants under the age of 18. Of course, it will be important to ensure appropriate methodologies are used that protect against the potential identification of participants.

Proposal 59-2 The Office of the Privacy Commissioner should develop and publish educational material about privacy issues aimed at children and young people.

PIAC supports Proposal 59-2. Such material should specifically address the issues surrounding the taking and publishing of images of children and young people, particularly in an on-line environment. The Talking Privacy website would be an effective way of communicating this material.

Proposal 59-3 NetAlert should include specific guidance on using social networking sites as part of its educational material on internet safety.

PIAC supports Proposal 59-3. Such guidance should be age-appropriate and should seek to make young people aware of the risks of social networking, including commercial exploitation, sexual predation and the loss of control of personal information. It should also seek to make young people aware of steps that they can take to reduce these risks.

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104 D P Farrington, 'Longitudinal research strategies: Advantages, problems, and prospects' (1991) 30 Journal of American Academy of Child & Adolescent Psychiatry 369-374.

105 Australian Law Reform Commission, Review of Australian Privacy Law: Discussion Paper 72, Proposal 5.2, [5.75].

Proposal 59-4 To promote awareness of personal privacy and respect for the privacy of others, state and territory education departments should incorporate education about privacy, and in particular privacy in the online environment into school curricula.

PIAC agrees that it would be convenient to use schools and the education system as vehicles for promoting awareness about personal privacy and respect for the privacy of others. However, recent cases and material coming to light about privacy practices within schools suggests that the issue of privacy is not one that is well understood or well managed in many schools.

In Director General, Department of Education and Training v MT [2006] NSWCA 270, PIAC acted for a student whose teacher had accessed medical information from her school file and disclosed it to the President of her soccer club (that was not connected to the school).[106] In another matter, a number of government schools in Victoria supplied their students' names and addressed to a bar and restaurant that gave them a dollar for each time the student's family ate there.[107]

PIAC also notes that in responding to Issues Paper 31, a number of bodies that act on behalf of children and young people raised serious concerns about privacy intrusive practices in schools, including fingerprinting for school library services and swipe cards for monitoring attendance.

While PIAC supports the incorporation of education about privacy into school curricula, it strongly recommends that this be supplemented by comprehensive training for teachers and other school staff about their responsibilities under school Privacy Policies and privacy laws generally.

106 The NSW Department of Education and Training acknowledged that this was the security principle, but claimed that it was not liable for breaches of other IPPs beyond that, because when the teacher disclosed the information he was not acting in his role as a teacher, but in his role as a soccer coach. The New South Wales Court of Appeal upheld the appeal on this basis.

107 Frank Golding, Private Lives: Your Guide to Privacy Law in Victoria, Victorian Law Foundation (2003) <http://www.victoralaw.org.au/PrivateLives/index.htm> at 21 December 2007.

Chapter 60. Decision Making by Individuals Under the Age of 18

Proposal 60-1 The Privacy Act be amended to provide that:

(a) an individual aged 15 or over is assumed to be capable of giving consent, making a request or exercising a right of access, unless found to be incapable (in accordance with the criteria set out in Proposal 60-2) of giving that consent, making that request or exercising that right.

(b) where it is practicable to make an assessment about capacity of an individual aged 14 or under to give consent, make a request, or exercise a right of access, then an assessment about the individual's capacity should be undertaken.

Where it is not practicable to make an assessment about the capacity of an individual aged 14 or under to give consent, make a request or exercise a right of access, then the consent, request or exercising of the right to access must be provided by the authorised representative of the individual.

PIAC welcomes the efforts of the ALRC to address the particular needs of children and young people in privacy regulation. PIAC supports the suggested approach that individuals under the age of 18 should be assessed individually to determine whether they have capacity to make a decision under the Act. This recognises that capacity for an adolescent is an evolving concept and that it is highly situation-specific. It also reflects the understanding of capacity in Article 5 of the United Nations Convention on the Rights of the Child (**CROC**) and is consistent with a rights-based approach to privacy.

PIAC also agrees that it is appropriate for the legislation to specify an age at which an individual is presumed to have capacity, given the practical reality that there will be situations where an individual assessment is not possible. PIAC notes that the suggested age of fifteen is supported by child development and other research.

However, PIAC is concerned that Proposal 60-1, when read in conjunction with Proposal 60-2, does not make it sufficiently clear that the presumption of capacity should only be relied upon if it is not practicable to carry out an individual assessment. There is a danger that organisations and agencies could take advantage of the proposed age limit as a reason not to carry out individual assessments of the capacity to consent, even in circumstances where this might be practicable. Stronger wording (perhaps in the form of an additional provision) should be used to make it clear that organisations and agencies should take all reasonable steps to assess capacity on an individual basis before they are able to presume that a young person aged 15 or over has capacity.

Proposal 60-2 The Privacy Act should be amended to provide that an individual aged under 18 is incapable of giving consent, making the request or exercising the right, if, despite the provision of reasonable assistance by another person, he or she is incapable, by reason of maturity, injury, disease, illness, cognitive impairment, physical impairment, mental disorder, any disability or any other circumstance, of:

(a) understanding the general nature and effect of giving consent, making the request or exercising the right; or

(b) communicating such consent or refusal of consent, making the request or personally exercising the right of access.

Where an individual under the age of 18 is considered incapable of giving consent, making the request or exercising the right, an authorised representative of the individual may give the consent, make the request or exercise the right on behalf of the individual.

PIAC supports Proposal 60-2, subject to the comments above in relation to Proposal 60-1. The Act should also make it clear that to the extent possible, children and young people should be involved in decision making, and their views considered, even where the child or young person is considered incapable of making the decision alone.

Proposal 60-3 The Office of the Privacy Commissioner should develop and publish guidelines for applying the provisions relating to individuals under the age of 18, including on:

(a) the involvement of children, young people and their authorised representatives in decision-making processes;

(b) situations where children and young people are capable of giving consent, making a request or exercising a right on their own behalf;

(c) practices and criteria to be used in determining whether a child or young person is incapable of giving consent, making a request or exercising a right on his or her own behalf;

(d) the provision of reasonable assistance to children and young people to understand and communicate decisions; and

(e) the requirements to obtain consent from an authorised representative of a child or young person in appropriate circumstances.

PIAC supports Proposal 60-3.

If the individual assessment process is to work effectively, it is crucial that there be adequate guidance and education to ensure that those making the assessment have the appropriate skills to conduct assessments. It is likely that health professionals will have the expertise and skills to provide support and to make an appropriate judgement about the capacity of the individual. However, there will be many other situations in which staff of service providers will not be used to interacting with young people in this way (for example, staff at fitness centres, who may ask the young person to provide information about medical

conditions, or staff in retail stores who request personal information from a young person for collection on a store database).

It will also be crucial that children and young people are educated about their rights under privacy legislation (see the comments above in relation to Proposals 59-2 and 59-4.)

Proposal 60-4 The Privacy Act should be amended to provide that an agency or organisation will not be considered to have acted without consent if it did not know, and could not reasonably be expected to have known from the information available, that an individual was aged 14 or under, and the agency or organisation acted upon the consent given by the individual.

Proposal 60-4 could open to abuse, particularly where a transaction with a young person takes place in an on-line environment, rather than face to face. The proposal should be worded to require the agency or organisation to take all reasonable steps to determine age and/or capacity to consent. This would be more consistent with the stronger approach advocated by PIAC in relation to Proposal 60-1 and also reflected in Proposal 61-3 regarding adults with a decision-making disability.

Proposal 60-5 Agencies and organisations that handle the personal information of individuals under the age of 18 should address in their Privacy Policies how such information is managed.

PIAC supports Proposal 60-5. Privacy Policies should be consistent with the proposed UPPs.

Proposal 60-6 Agencies and organisations that regularly handle the personal information of individuals under the age of 18 should ensure that staff are adequately trained to assess the decision-making capacity of children and young people.

PIAC supports Proposal 60-6. Training should be carried out by privacy specialists, possibly as part of broader training programs aimed at improving staff awareness and practices in relation to personal information and should include materials dealing with the continuum of decision-making capacity and the fact that a child or young person may have capacity in respect of some decisions and not in respect of others.

Proposal 60-7 Schools should clarify in their Privacy Policies how the personal information of students will be handled, including when personal information:

(a) will be disclosed to or withheld from persons with parental responsibility;

(b) collected by school counsellors will be disclosed to the school management, persons with parental responsibility, or others.

PIAC supports Proposal 60-7, but refers the ALRC to the comments above under Proposal 59.4 about the need for teachers and staff in schools to receive comprehensive training about their responsibilities under school Privacy Polices and privacy law generally.

Schools should also ensure that Privacy Policies are made available to students and parents.

Proposal 60-8 The Office of the Privacy Commissioner should include consideration of the privacy of children and young people in the proposed criteria for

assessing the adequacy of media privacy standards for the purposes of the media exemption.

PIAC strongly supports Proposal 60-8. See the comments above in relation to Proposal 38-2.

Chapter 61. Adults with a Temporary or Permanent Incapacity

Question 61-1 Should the Privacy Act be amended to provide expressly that all individuals aged 18 and over are presumed to be capable of giving consent, making a request or exercising a right of access unless found to be incapable of giving that consent, making that request or exercising that right?

Yes, the presumption that all individuals aged 18 years and over have capacity to make a decision under the Privacy Act (unless found to be incapable of making that decision) should be expressly set out in the Act. This will provide clarity and certainty in this area, making it less likely that organisations and agencies will make discriminatory assumptions that a person lacks capacity simply because they have a particular disability.[108]

This approach is consistent with human rights instruments that recognise that people with disabilities have a right to autonomous decision-making unless proven incapable. It is also consistent with approaches adopted in guardianship and administration legislation in some jurisdictions.[109] PIAC notes that the Disability Council of NSW recently recommended that all relevant legislation should include the presumption of decision-specific capacity.[110]

Proposal 61-1 The Privacy Act should be amended to provide that an individual aged 18 or over is incapable of giving consent, making a request or exercising a right under the Act, if despite the provision of reasonable assistance by another person, he or she is incapable by reason of injury, disease, illness, cognitive impairment, mental disorder, any disability, or any other circumstance, of:

(a) understanding the general nature and effect of giving consent, making the request or exercising the right; or

(b) communicating such consent or refusal of consent, making the request or personally exercising the access.

Where an individual is considered incapable of giving consent, making a request or exercising a right under the Act, then an authorised representative of that individual may give the consent, make the request or exercise the right on behalf of the individual.

PIAC supports the proposal that the Act should set out a test for determining whether or not a person has capacity. However, the wording 'despite the provision of reasonable assistance by another person' may narrow the scope of the provision unnecessarily. In some situations, reasonable assistance may involve the

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108 For example, certain organisations requiring people with intellectual disability to produce a signed power of attorney or guardianship order and have all decisions made by the authorised third party: see Legal Aid Queensland, Submission PR 212, 27 February 2007.

109 See, for example, Guardianship and Administration Act 2000 (Qld) and Mental Capacity Act 2005 (UK).

110 Disability Council of NSW, Are the rights of people whose capacity is in question being adequately promoted and protected? Submission to the Attorney General's Department of New South Wales (2006).

use of technology, rather than the assistance of another person, for example an assisted communication device. PIAC recommends the following wording as preferable: 'despite the provision of all reasonable and appropriate steps being taken to provide assistance'.

PIAC supports the principle that capacity should be assessed on a decision-specific basis, as this provides maximum opportunity for autonomy and self-determination by recognising that a person may have capacity in some circumstances but not in others. This is consistent with the approach generally taken in guardianship law.

PIAC also agrees that where a person is found to be incapable of making decisions about his or her personal information, an authorised representative should be able to do so on his or her behalf. In its current form, the Privacy Act has inadequate mechanisms for alternative decision-making and this has resulted in confusion and unnecessary barriers to effective service provision.

Proposal 61-2 The Privacy Act should be amended to introduce the concept of 'authorised representative', defined as a person who is, in relation to an individual:

(a) a guardian of the individual appointed under law;

(b) a guardian of the individual under an enduring power of attorney;

(c) an attorney for the individual under an enduring power of attorney;

(d) a person who has parental responsibility for the individual if the individual is under the age of 18; or

(e) otherwise empowered under the law to perform any function or duties as agent in the best interests of the individual.

The Privacy Act should state that an authorised representative is not to act on behalf of the individual in any way that is inconsistent with an order made by a court or tribunal, in contravention of the terms of any appointment under law, or beyond the powers provided for in an enduring power of attorney.

PIAC concerned that the list of authorised representatives set out in Proposal 61-2 is too narrow. It does not take account of informal care and support arrangements that often exist where an adult has a decision-making disability. For example, there is no provision for a parent or sibling of an adult with a decision-making disability to act as an authorised representative unless they have been legally appointed as a guardian, attorney or agent.

The existence of informal arrangements is consistent with the philosophy underpinning Australian guardianship and administration legislation. This legislation seeks to maximise involvement in decision-making by the individual and ensure that the least restrictive decision-making processes are available. Generally, formal guardianship or administration orders should be made only as a last resort when informal arrangements have broken down.[111]

111 Office of the Public Advocate, Queensland, Submission PR 195, 1 March 2007, 2.

Having to appoint a formal guardian is time consuming and may place significant restrictions on the autonomy of the individual in areas other then privacy-related decisions. Applications for Powers of Attorney are may also impose generalised restrictions on autonomy.

The Privacy Act should also state that where lack of capacity has been demonstrated, any act or decision undertaken on the person's behalf must be in their best interests and carried out in a way that causes the least restrictions on or impairment to the person's rights and freedom of action. This would give some recognition to the principle of autonomy of people with a disability, which is reflected in a range of international and domestic legal frameworks, including the United Nations Convention on the Rights of People with Disabilities.

Question 61-2 Should the definition of 'authorised representative' include a person who was nominated at the time when the individual had the capacity to make the appointment?

Yes, the definition of 'authorised representative' should include a person who was nominated at the time when the individual had the capacity to make the appointment. This recognises that capacity is not a fixed concept and that it can change over time. For example, mental illness might lead to episodic impairment of decision-making capacity and dementia may lead to a gradual deterioration of capacity.

Proposal 61-3 The Privacy Act should be amended to provide that an agency or organisation that has taken reasonable steps to validate the authority of an authorised representative will not be considered to have engaged in conduct constituting an interference with the privacy of an individual merely because it acted upon the consent, request or exercise of a right by that authorised representative, if it is later found that the authorised representative:

(a) was not properly appointed; or

(b) exceeded the authority of his or her appointment.

PIAC supports Proposal 61-3. Without this provision, there is a danger that agencies and organisations might adopt an overly-cautious, risk-averse approach when dealing with persons with decision-making disabilities and their authorised representatives. This type of approach could impact adversely on service provision.

Proposal 61-4 The Office of the Privacy Commissioner should develop and publish guidance for applying the provisions relating to individuals aged 18 and over incapable of giving consent, making a request or exercising a right on their own behalf, including on:

(a) the provision of reasonable assistance to individuals to understand and communicate decisions;

(b) practices and criteria to be used in determining whether an individual is incapable of giving consent, making a request or exercising a right on his or her own behalf.

PIAC supports Proposal 61-4. Guidelines would provide practical advice on the implementation of the proposed provisions and would improve consistency in the way that organisations and agencies deal with individuals who have decision-making disabilities and their representatives.

Guidelines should note the possible fluctuating nature of capacity for some individuals and the need to apply a presumption that an individual has capacity until found not to have capacity for a particular decision. They should also set out how to make decisions in practice regarding capacity, and that the Disability Discrimination Act 1992 (Cth) provides an appropriate mechanism for making a complaint if discrimination occurs. They should also make it clear that an unwise decision does not necessarily prove lack of capacity.

In preparing the guidelines the OPC should be required to consult with the Federal Disability Discrimination Commissioner, such state and territory Attorneys General as have undertaken work on providing guidance on capacity issues and with the peak disability advocacy groups.

The Privacy NSW Best Practice Guide: Privacy and people with decision-making disabilities would serve as a useful model.

Proposal 61-5 Agencies and organisations that handle personal information about people incapable of making a decision should address in their Privacy Policies how such information is managed.

PIAC supports Proposal 61-5. Privacy Policies should also address the situation where a person is temporarily incapable of making a decision; for example, if they have an episodic mental illness.

People with decision-making disabilities are particularly vulnerable to breaches of their physical and territorial privacy. For example, PIAC is aware of people with intellectual disability being forced to wear tracking devices and being photographed and filmed in humiliating and embarrassing circumstances, with the films subsequently being posted on the internet. Privacy Policies should deal with these types of privacy breaches as well and make it clear that individuals or organisations engaging in such conduct could be the subject of an action for invasion of privacy.

Proposal 61-6 Agencies and organisations that regularly handle personal information about adults incapable of making a decision should ensure that their staff are trained adequately to assess the decision-making capacity of individuals.

PIAC supports Proposal 61-6. This would assist with the practical implementation of the provisions. Training should be carried out by people with expertise in dealing with adults with decision-making disabilities and should include materials dealing with the continuum of decision-making capacity and the fact that a person may have capacity in respect of some decisions and not in respect of others.

Chapter 62. Other Third Party Assistance with Decision Making

Proposal 62-1 The Office of the Privacy Commissioner should develop and publish guidelines for practices and procedures that allow for the involvement of third parties to assist with making and communicating privacy decisions where individuals consent.

PIAC supports Proposal 62-1.

Question 62-1 Should the Privacy Act be amended to expressly allow a third party nominated by the individual to give consent, make a request or exercise a right of access on behalf of an individual, either for one-off or long term arrangements?

Yes, the Privacy Act be amended to expressly allow a third party nominated by the individual to give consent, make a request or exercise a right of access on behalf of an individual, either for one-off or long term arrangements, so long as there are clearly worded guidelines on how and when such an arrangement could be relied upon.