



**Balancing information, privacy and accessibility:
some comments on *Towards Government 2.0***

24 August 2009

**Robin Banks, Chief Executive Officer
Lizzie Simpson, Solicitor and
Deirdre Moor, Manager Policy & Programs**

Introduction

The Public Interest Advocacy Centre

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

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

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

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the NSW Government Department of Water and Energy 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 work relevant to Government 2.0

Open government

PIAC has a long-standing interest in open government and is a supporter of citizens' active participation in democratic processes. For over a decade, PIAC has provided public and customised training courses in how to 'work the system' and advocate effectively, empowering community members with the knowledge and skills to participate in and influence society's governance.

PIAC's Chief Executive Officer, Robin Banks, participated in the Governance stream of Australia's 2020 Summit, which called for an online portal of free and searchable government information, and a space for citizens to participate and share their views¹, which is the essence of Government 2.0.

Freedom of information

PIAC also has interest and expertise in freedom of information, and in privacy, advocating on the one hand for citizens to have access to public sector information, and on the other for adequate protection of an individual's right to privacy.

¹ Australian Government, *Australia 2020 Summit-Final Report* (2009) [9.71] <http://www.australia2020.gov.au/final_report/index.cfm> at 24 August 2009.

For over fifteen years, PIAC has utilised freedom of information legislation on behalf of clients. PIAC has undertaken a number of test cases under freedom of information legislation including *Searle Pty Ltd v PIAC* (1992) 102 ALR 163 and *Re Organon (Australia) Pty Ltd and Department of Community Services and Health* (1987) 13 ALD 588.

PIAC has written papers and contributed to debates about freedom of information (FOI) legislation including making submissions to the Australian Law Reform Commission in respect of its inquiry into the FOI Act in March and July 1995², and more recently making a submission to the NSW Ombudsman in respect of his review of the *Freedom of Information Act 1989* (NSW)³, to the Commonwealth Government's exposure draft of the Freedom of Information Amendment (Reform) Bill 2009 and the Information Commissioner Bill 2009⁴, and on the NSW Government's exposure drafts of reforms to FOI laws.⁵

Privacy

PIAC also 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 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.

² Australian Law Reform Commission, *Open government: a review of the federal Freedom of Information Act 1982*, Report No 77 (1995). See also, Kate Harrison, *Access to government using the Freedom of Information Act* (1983) PIAC; PIAC and Council of Social Services of NSW, *Freedom of Information: Community Information Program* (1988); Chris Shanahan, *Confidence and Confidentiality: Freedom of Information – Public and Private Right* (1992) PIAC; Fiona McMullin, *Public interest issues in exemption claims under the Commonwealth Freedom of Information Act: experiences of the Public Interest Advocacy Centre 1984-1994* (1994) PIAC; Bill McManus, *Australian Law Reform Commission – Review of the Freedom of Information Act 1982 (Cth): Submission in response to Discussion Paper No 59* (1995) PIAC; PIAC, *Australian Law Reform Commission Inquiry into the Freedom of Information Act 1982 (Cwth): Submission in response to issues paper 12 'Freedom of Information'* (1995); PIAC, *Submission on the Freedom of Information (Removal of Conclusive Certificates and Other Measures) Bill 2008* (2009). PIAC submissions are available on the PIAC website, <<http://www.piac.asn.au/publications/pubs/dateindex.html>> at 24 August 2009.

³ NSW Ombudsman, *Opening up government: Review of the Freedom of Information Act 1989, Special Report to Parliament* (2009). Lizzie Simpson, Ee-von Lok and Claire O'Moore, *Freeing up information: response to the NSW Ombudsman's Review of Freedom of Information Law in NSW* (2008) Public Interest Advocacy Centre <http://www.piac.asn.au/publications/pubs/sub2008111_20081117.html> at 19 May 2009.

⁴ Lizzie Simpson, *Putting public interest at the heart of FOI: Submission in response to the Commonwealth Government's exposure draft of the Freedom of Information Amendment (Reform) Bill 2009 and the Information Commissioner Bill 2009* (2009) Public Interest Advocacy Centre <http://www.piac.asn.au/publications/pubs/SUB2009051_20090519.html> at 24 August 2009.

⁵ Lizzie Simpson, *Improving government accountability through information access: Submission in response to the NSW Government's public consultation draft, Open Government Information legislative package* (2009) Public Interest Advocacy Centre <http://www.piac.asn.au/publications/pubs/sub2009060_20090605.html> at 21 August 2009.

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. 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.

Access for people with disability

PIAC has a long history of involvement with the operation of human rights and anti-discrimination law in Australia. This has included conducting test case litigation under both Federal and NSW anti-discrimination statutes, proposing amendments to both substantive and procedural aspects of anti-discrimination law and responding to new and amending anti-discrimination legislation.

In May 2003, PIAC made an extensive submission in response to the Productivity Commission's Issues Paper on the *Disability Discrimination Act 1992* (Cth) (the DDA). That submission focused on the interpretation and application of the phrase 'unjustifiable hardship' and on the complaint process.

In August 2000, PIAC acted for Mr Bruce Maguire who lodged two complaints of unlawful disability discrimination against the Sydney Organising Committee for the Olympic Games (SOCOG)⁶.

The second complaint related to SOCOG's website. Mr Maguire wanted to access the website and keep up to date with current news of the Games. Mr Maguire had the software and hardware that enabled him to read websites that are formatted to provide access. SOCOG's website was not formatted correctly and was therefore inaccessible to him. Commissioner Carter found that SOCOG had indirectly discriminated against Mr Maguire by failing to make the website accessible to him, rejecting SOCOG's argument of unjustifiable hardship, which was that the cost and time of changing the website outweighed the benefit to Mr Maguire and others.

This case received considerable media and professional attention and was the first case in relation to access to websites in the world.

General Comments

PIAC welcomes the opportunity to contribute to the discussion about Government 2.0 and its implementation in Australia. PIAC is strongly in support of the program's aims of making government information more accessible and useable, and making government more consultative, participatory and transparent.⁷

The challenge is to implement Government 2.0 in a way that balances open government and freedom of information with privacy, while providing maximum access for people with a disability or other particular needs.

In this submission PIAC has chosen to comment only on specific questions related to areas where it has expertise.

⁶ *Bruce Lindsay Maguire v Sydney Organising Committee for the Olympic Games* [2000] HREOC No. H 99/115 (Unreported, W Carter HC, 24 August 2000)

<http://humanrights.gov.au/disability_rights/decisions/comdec/2000/DD000120.htm> at 24 August 2009.

⁷ Government 2.0 Taskforce, *Towards Government 2.0: an Issues Paper* (2009)

<<http://gov2.net.au/consultation/2009/07/23/towards-government-2-0-an-issues-paper-final/>> at 24 August 2009.

Specific consultation questions

Question 24:

What sort of privacy questions might dissuade individuals from engaging with government via collaborative technologies? What sort of steps can we take to ensure that personal information is used appropriately? What options are there for mitigating any personal privacy risks?

The key concerns that need to be considered in using these technologies is what, if any, personal information is collected 'invisibly' from people visiting the site(s) and how is that information subsequently stored, used and disclosed. If people who have engaged with government through using Government 2.0 and subsequently discover that information has been collected about their visit to the site without there being public disclosure of that collection (as well as information about the purpose of collect, use, storage and disclosure), those people are less likely to be willing to use such technologies in future to engage with government and, indeed, may reduce their other engagement with government processes. This would be a significant negative impact on government information transparency and consultation.

Further, if individuals are required to disclose personal information in order to participate in discussions or consultations through Government 2.0, this could well discourage people from engaging in this way.

To the greatest extent possible Government 2.0 should allow for anonymity and pseudonymity both on the face of the process, but also through not collecting information about users, beyond data that does not permit identification in any way of the users.

The potential for users to disclose personal information of a third party highlights the need for active moderation of Government 2.0 to prevent it being used for unlawful or illegal purposes including breach of privacy, defamation and harassment.

Question 25:

How can government make it easier for people to engage on policy and other issues and make sure the opportunities are as open as possible?

While use of information technologies can (and most likely will) make it easier and more comfortable for some people to engage on policy and other issues, the total reliance on such technologies is to be avoided. There are far too many people in Australia who remain unable to access, either at a reasonable cost or at all, the benefits of such technologies. While most people working in office environments would have ready access to the technologies that will enable them to participate, others working in other environments and many who do not have paid employment do not have anything like the same ease of access. It would be inappropriate for Government to rely solely on Government 2.0 as a means of access to information and as a mechanism to obtain public input to government processes and conduct consultations.

Government needs to commit to parallel mechanisms to ensure access for those otherwise precluded.

In addition, the use of Government 2.0 as a portal to government information means that all information must be provided in an accessible form on-line with a mechanism readily available for a person to request the information be provided to them directly in an accessible form. This could mean, for example, having an identified office within government that can be contacted to request the relevant government information be sent by post in a particular form.

This approach is necessary to comply with Australia's commitments under the UN *Convention on the Rights of Persons with Disability*⁸, in particular, its obligations under the following Articles of that Convention:

Article 9 – Accessibility

1. To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, ... to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas. These measures, which shall include the identification and elimination of obstacles and barriers to accessibility, shall apply to, inter alia:

...

b) Information, communications and other services, including electronic services and emergency services.

2. States Parties shall also take appropriate measures:

a) To develop, promulgate and monitor the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public;

...

f) To promote other appropriate forms of assistance and support to persons with disabilities to ensure their access to information;

g) To promote access for persons with disabilities to new information and communications technologies and systems, including the Internet;

h) To promote the design, development, production and distribution of accessible information and communications technologies and systems at an early stage, so that these technologies and systems become accessible at minimum cost.

Article 29 - Participation in political and public life

States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake:

a) To ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly ...

b) To promote actively an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination and on an equal basis with others, and encourage their participation in public affairs ...

While a web-based access portal to allow engagement with government on current issues will be a significant boon to consultation for many people, it cannot be seen as a substitute and Government needs to continue to consider effectively ways of engaging directly with those affected by particular proposals as well as the broader community on all government issues. An example from PIAC's recent work in the area of human rights highlights the benefit of direct and personal engagement with affected members of the community. As part of its work to promote engagement with the National Human Rights Consultation, PIAC worked with the Homeless Persons' Legal Service (HPLS)⁹ to develop and deliver a theatre-based consultation process for homeless people. PIAC and HPLS worked with Milk Crate Theatre in Sydney to develop an interactive performance that was then conducted in four venues that are familiar to and used by homeless people. Through the interactivity of the performance and the opportunity after the performance for those who attended to have their additional views and ideas recorded, PIAC and HPLS was able to

⁸ *Convention on the Rights of Persons with Disabilities*, opened for signature 31 March 2007, UN Doc/A61/611 (entered into force 3 May 2008, entered into force for Australia 16 August 2008).

⁹ The Homeless Persons' Legal Service is a joint initiative of PIAC and the Public Interest Law Clearing House. PIAC receives funding from the NSW Public Purpose Fund through the support of the NSW Attorney General to run the HPLS and from the City of Sydney to enable HPLS to support Street Care, a group of homeless and formerly homeless people who are able to advise government and others on effective methods of consulting with homeless people.

generate significant interest in and engagement with the National Human Rights Consultation. All of the input received was then collated and provided to the Consultation Panel in the form of a submission and an attachment to that submission.¹⁰

While such processes can require additional resources and thought, they are and will remain an important, necessary and valuable means of ensuring that all parts of the community feel and are engaged with government policy and development.

Question 26:

What trade-offs must be considered between government using commercially available and popular online platforms and ensuring inclusive participation with all members of society and how should those trade-offs be made?

Government should not trade off maximum accessibility in order to use commercially available and popular online platforms. Through requiring any platforms used to achieve mandated standards of accessibility, Government provides an important incentive for technology developers to bring their products in line with community expectations and equality rights as protected by law in Australia.

Government procurement policies that require full accessibility features can and should be used as a practical means of making such features the norm rather than the exception to the rule. This has both the obvious benefit of ensuring that Government complies with its own anti-discrimination laws, as well as the flow-on benefit of reducing the cost of those features for members of the community who require them as such features become standard.

In considering these issues, PIAC urges the Government to resource the Australian Human Rights Commission (AHRC) to provide its expert advice on access for people with disabilities to emerging technologies. To date, the AHRC has been a leading advocate for access for people with disabilities and has developed significant expertise in this area.

Question 35:

What role could the proposed OIC play in encouraging the development of Government 2.0? Are there practical recommendations the Taskforce might make about how the OIC might best fulfil its functions in relation to optimising the dissemination of Government information?

In its submission to the Government in response to the exposure draft of the Freedom of Information Amendment (Reform) Bill 2009 and the Information Commissioner Bill 2009¹¹, PIAC supported the idea that the Office of the Information Commissioner (OIC) should not only administer the freedom of information legislation and the *Privacy Act 1988* (Cth), but should also be responsible for the overarching information policy of government. PIAC also submitted that the OIC should become an advocate for a whole-of-government approach to information policy and opening up government information to the public. PIAC therefore contends that it is critical that the OIC playing a leading role in developing, implementing and monitoring the use of Web 2.0 by government.

Furthermore, PIAC notes that in the discussion paper, the Taskforce has asked for comments about the possible privacy risks of Government 2.0 and how these risks should be managed. PIAC submits that

¹⁰ Homeless Persons' Legal Service, *Our rights matter! The voices of those who are or have been homeless in Sydney* (2009) Public Interest Advocacy Centre
<http://www.piac.asn.au/publications/pubs/sub2009062_20090615.html> at 21 August 2009.

¹¹ Lizzie Simpson, above n 4.

another reason why the OIC should be given a leading role in Government 2.0 is because it would be uniquely placed to consider questions about privacy and how to balance them against the public interest in maximising the disclosure of government information to the public. In particular, under the proposed freedom of information and privacy reforms, the Office of the Privacy Commissioner will be relocated within the OIC, but will remain a separate deputy commissioner who can advocate to the OIC about privacy issues, including some of the risks that arise out of Government 2.0.

Finally, from a practical perspective, as it is essential that the OIC is involved in Government 2.0 as there is significant overlap between the types of documents that the Issues Paper suggests should be released as part of Government 2.0 and the types of information that the OIC will be responsible for overseeing and monitoring. For example, the Issues Paper suggests that it would be helpful if government agencies released assets lists on the internet, while the exposure draft referred to information publication schemes. However, the idea behind the lists and schemes is almost identical, namely that each agency should create a list of all the documents (and links to those documents) that are publicly available.

While, PIAC acknowledges that giving the OIC such a significant role in the development of Government 2.0 may place some pressures on the OIC, PIAC submits that if the Taskforce develops a framework, recommendations and research that could be used by the OIC to develop its whole of government policy on information, including the use of web 2.0 this would assist the OIC in successfully taking the lead on the Government 2.0 initiative.