



**It's time: Submission in response to the
Department of Prime Minister and Cabinet's
Issue Paper – A Commonwealth Statutory
Cause of Action for Serious Invasion of
Privacy**

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Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation. PIAC 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 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; and
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the Industry and Investment NSW for its work on energy and water, 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 on privacy

PIAC has a long history as a strong advocate for the protection of the privacy rights of Australians. PIAC's experience in protecting privacy stems in large part from PIAC's work as a consumer advocacy organisation – particularly in relation to health matters, where the sensitivity of the personal information in question necessitates superadded protection.

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) (**PIIP Act**) and the *Privacy Act 1988* (Cth) (**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. At the Commonwealth level, PIAC made a complaint to the Commonwealth Privacy Commissioner on behalf of a former Villawood detainee whose personal information was inappropriately disclosed to the media during an immigration raid. PIAC also regularly receives requests for legal advice and assistance from individuals who feel that their privacy has been seriously compromised.

PIAC has played a leading role in privacy debates in Australia, contributing to a number of inquiries and reviews at the national and state levels – for example, addressing the privacy implications of the proposed Health and Social Services Access Card¹, 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 relation to the possible advent of a statutory cause of action for breach of privacy, which is the subject of the discussion paper, PIAC has previously made submissions in response to the New South Wales Law Reform Commission's (NSWLRC) *Consultation Paper 1 – Invasion of Privacy*,³ and the Australian Law Reform Commission's (ALRC) Discussion paper 72: *Review of Australian Privacy Law*.⁴ PIAC would particularly like to acknowledge the contribution made by Ms Robin Banks, and Anne Mainsbridge in relation to this issue in PIAC's earlier submissions about a statutory cause of action for invasion of privacy.

General comments about the introduction of a statutory cause of action

PIAC congratulates the Government on its discussion paper regarding a possible statutory cause of action. In particular, we commend the Government on surveying many of the recent approaches to this issue, drawing together the work of the ALRC, NSWLRC and Victorian Law Reform Commission.

This submission draws on PIAC's earlier submissions to the ALRC and the NSWLRC on the same issue. It also draws on the conclusions reached by the Victorian Law Reform Commission's (VLRC) in its report, *Surveillance in Public Places*⁵.

Based on PIAC's experience as both a community legal centre and a consumer advocacy organisation, PIAC believes that Australia's current legal framework does not adequately protect

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 Anne Mainsbridge, *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) <http://www.piac.asn.au/sites/default/files/publications/extras/07.10.03-NSWLRCPrivacy_Submission.pdf> at 20 October 2011.

⁴ Anne Mainsbridge and Robin Banks, *Resurrecting the Right to Privacy: Response to the Australian Law Reform Commission Discussion Paper 72: Review of Australian Privacy Law* (2007) <http://www.piac.asn.au/sites/default/files/publications/extras/07.12.21-PIAC_Sub_to_DP72.pdf> at 20 October 2011.

⁵ Victorian Law Reform Commission, *Surveillance in Public Places: Final Report* 18(2010), ch 7 www.lawreform.vic.gov.au/wps/wcm/justlib/Law+Reform/Home/Completed+Projects/Surveillance+in+public+places/ on 27 October 2011.

Australians' privacy rights. PIAC strongly supports the introduction of a statutory cause of action for serious invasions of privacy.

PIAC contends that the best approach to how the cause of action should be formulated would involve a combination of the recommendations of the different law reform commissions. As a starting point, PIAC agrees with the NSWLRC's approach that persons should be protected 'in a broad range of contexts' from serious invasions of their privacy.⁶ If the boundaries of a cause of action are too narrow, the cause of action will be of limited use and add little to the existing law.

On the other hand, PIAC recognises that the right to privacy is not an absolute right and should be subject to checks and balances.

As a starting point, PIAC would prefer a general cause of action, actionable without proof of damage broadly along the lines put forward by the NSWLRC. However, it would be helpful if the statute also included a non-exhaustive list of indicia of an invasion of privacy to provide courts (and the parties) with some guidance. PIAC considers that this model has the following advantages:

- it avoids the almost impossible task of providing a conclusive definition of the term 'privacy' (a step that could potentially limit 'privacy', and one that was avoided, rightly in our view, by the ALRC)⁷;
- it is open-ended and inclusive, which would build sufficient flexibility into the proposed cause of action for it to be appropriately adapted to changing social and technological circumstances; and
- it strikes an appropriate balance between being a general, but structured cause of action.

Turning to the appropriate test for the proposed statutory cause of action, PIAC contends that the threshold test should be that there is an invasion of privacy 'if the conduct of another person invaded the privacy that the individual was reasonably entitled to expect'. However, PIAC disagrees with the ALRC and NSWLRC's view that the different public interests should be incorporated into the cause of action itself.

Instead, PIAC prefers the VLRC's approach to this issue, and contends that it is more appropriate for countervailing rights and interests as one of a number of defences to the proposed cause of action. In determining whether there has been a reasonable invasion of privacy, PIAC agrees with the list of relevant considerations put forward by the NSWLRC.

In this submission, PIAC has chosen to comment only on specific questions related to areas where it has expertise. In particular, this submission comments on the need to introduce a statutory cause of action, elements of a proposed cause of action and defences. Additionally, PIAC emphasises that in order to make the proposed action accessible to disadvantaged or marginalised groups, that whatever decision-making or dispute-resolution body is given the responsibility of adjudicating privacy invasion cases, the general rule should be that each party bears its own costs.

⁶ New South Wales Law Reform Commission, *Report 120: Invasion of Privacy (2009)* [www.lawlink.nsw.gov.au/lawlink/lrc/lrc.nsf/vwFiles/R120.pdf/\\$file/R120.pdf](http://www.lawlink.nsw.gov.au/lawlink/lrc/lrc.nsf/vwFiles/R120.pdf/$file/R120.pdf) on 24 October 2011, [1.20].

⁷ Australian Law Reform Commission, *Report 108-For Your Information: Australian Privacy Law and Practice (2008)*, <http://www.alrc.gov.au/publications/report-108> at 24 October 2011, [1.31]-[1.68].

PIAC's comments in response to specific questions

1. Do recent developments in technology means that additional ways of protecting individuals' privacy should be considered in Australia?

The Hon Michael Kirby AC CMG has referred to 'the extraordinary capacity of technology today to offer fresh ways of invading privacy'.⁸ There can be no doubt that the advent of technological developments, such as the internet and social networking sites, have made individual privacy increasingly vulnerable to attack. For example, technology now exists that makes it possible for security agencies to track people via their mobile phones and to obtain information about their internet use effectively in real-time.⁹ There is also an increased incidence of surveillance in all areas of public life, frequently justified as a counter-terrorism measure.¹⁰

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

We note the ALRC's detailed treatment of the issue in its report '*For Your Information: Australian Privacy Law and Practice*'¹² and endorse the ALRC's general approach to responding to the challenges that technological change poses for protecting individuals' privacy.

2. Is there a need for a cause of action for serious invasion of privacy in Australia?

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

The current regulatory regime does not adequately protect the privacy of Australians. The PPIP Act and the Privacy Act focus on information privacy (or 'data protection') and fail to protect against invasions of privacy that involve interference with one's person or territory.

⁸ Michael Kirby, 'Privacy – In the Courts' (2001) *University of NSW Law Journal* 2 <http://www.austlii.edu.au/au/journals/UNSWLawJl/2001/2.html> > 17 November 2011.

⁹ Tom Allard, 'Spy Laws Track Mobile Phones', *Sydney Morning Herald* (Sydney) 17 September 2007, 1.
¹⁰ Ibid.

¹¹ Office of the Privacy Commissioner, *Media Release: National Privacy Survey – ID Theft, ID Scanning and Online Privacy Concerns Are On the Rise* (28 August 2007), Office of the Australian Information Commissioner <http://www.privacy.gov.au/aboutprivacy/attitudes> at 4 November 2011, p 5.

¹² Australian Law Reform Commission, *Report 108-For Your Information: Australian Privacy Law and Practice* (2008), <http://www.alrc.gov.au/publications/report-108> > at 24 October 2011, ch 10.

Additionally, both Acts contain a myriad of exemptions, which are overbroad in their scope and serve to undermine the effectiveness of the respective statutes. Some of these include:

- the exemption for ‘employee records’ in the Privacy Act;¹³
- the exemption for small businesses from the Privacy Act;¹⁴
- the exemption for ‘media organisations’ from the Privacy Act;¹⁵
- exemptions to the definition of ‘personal information’ in the PPIP Act.¹⁶

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

In some instances, there has been a failure to use existing laws that are intended to protect privacy. For example, Division 3A of the *Children (Criminal Proceedings) Act 1987* (NSW) (**CCP Act**) makes it a criminal offence to publish or broadcast the name, or any identifying information, of a young person who is involved in criminal proceedings at any time before, during or after the proceedings. Despite this, the media routinely identify children and young people involved in criminal proceedings in New South Wales.¹⁷

In PIAC’s experience, criminal proceedings are rarely initiated where an offence pursuant to this provision has been committed and PIAC is only aware of one successful prosecution of this offence to date.¹⁸ As a consequence of failure to enforce the law in this area, children and their families often endure negative consequences beyond the punishment meted out by the criminal justice system. For example, PIAC is aware of children who have experienced significant difficulties securing placements in schools and other educational and vocational institutions as a

¹³ *Privacy Act 1988* (Cth) s 7B(3).

¹⁴ *Privacy Act 1988* (Cth) s 6C(1). The effect of this provision, when read in conjunction with the definitions of ‘small business’ and ‘small business operator’ in section 6D is that businesses with an annual turnover of \$3 million or less have been exempt from the *Privacy Act 1988* (Cth). This exemption has been heavily criticised, as an estimated 94 percent of businesses fall below the limit: see, for example Parliament of Australia – House of Representatives Standing Committee on Legal and Constitutional Affairs, *Advisory Report on the Privacy Amendment (Private Sector) Bill 2000* (2000), chapter 2.

¹⁵ *Privacy Act 1988* (Cth) s 7B(4).

¹⁶ *Privacy and Personal Information Protection Act 1998* (NSW) s 4(3).

¹⁷ For example, Channel 7’s *Today Tonight* program broadcast a story on 1 March 2005 that directly identified ‘DR’, one of two young persons killed as a result of a motor vehicle collision following a police pursuit in Macquarie Fields. The story also made false claims about DR’s criminal history.

¹⁸ Mr Alan Jones was prosecuted under s 11 CCP Act (s 11 was repealed and replaced by Division 3A in 2009) in 2005 in relation to a broadcast on Radio Station 2GB in July 2005. Mr Jones subsequently appealed to the District Court who dismissed his appeal in the case of *Ian Belford Jones; Harbour Radio Pty Ltd; Nationwide News Pty Ltd v R* [2008] NSWDC 8.

result of public disclosure of their involvement in the criminal justice system. In the absence of a general right to take legal action for invasion of privacy, there is limited legal recourse available to those affected by the media's flagrant disregard of the law.

A second example of some of the limitations of existing privacy laws is highlighted by PIAC's experience representing a woman who was detained at Villawood Detention Centre following a raid by the Department of Immigration and Citizenship on a massage parlour in NSW. A journalist and photographer from the *Daily Telegraph* accompanied the Department on the raid and a few days later an article about the raid was published titled 'Exposing Sydney's Sex Slave Traders'. The article did not disclose our client's name, but identified her nationality and the fact that she had been detained at Villawood. At the time, she was the only woman of that nationality at the detention centre and so was identified by members of her community and fellow detainees. She subsequently suffered harassment and was ostracised by her family and community.

In 2005, PIAC wrote to the Office of the Privacy Commissioner (OPC) alleging that the Department had interfered with her privacy under the Privacy Act. The OPC then asked the parties to engage in conciliation, which continued for almost four years. When conciliation reached an impasse, the OPC indicated that it was minded to terminate the complaint under s 41(2)(a) of the Privacy Act, which would have left our client with no opportunity to appeal against the decision. As a result our client felt that she had little choice but to accept the Department's offer of \$10 000 compensation for her psychiatric injury, which she had suffered as a result of the publication of the article.

PIAC's client was extremely unhappy with the outcome of the complaint and felt that there was no justice in her case. While our client had been able to make a complaint under the Privacy Act, because the OPC had the power to terminate the complaint, without providing any avenue of appeal from this decision, this remedy was effectively illusory. Our client had also initially considered bringing a common law claim but abandoned this aspect of her complaint because of the uncertain state of the common law regarding a tort of privacy.

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

- A man with an intellectual disability is filmed without his knowledge or consent while he is defecating in a public place. The film is subsequently shown on the internet.¹⁹
- Personal information about a convicted inmate is disclosed to the media by the Department of Correctional Services. The inmate's spouse and children suffer hurt, humiliation and distress as a result. Although they can bring a complaint before the relevant public authority, they are not entitled to any monetary compensation if the complaint is upheld.²⁰
- A NSW Police officer releases the name of a person suspected of a crime to the media, and asserts that the information related to 'core policing functions'.²¹

¹⁹ This is based on a real situation.

²⁰ This is a hypothetical example based upon the operation of *Privacy and Personal Information Protection Act 1998* (NSW) ss 53(7A) and 55(4A)

²¹ Section 27 of the *Privacy and Personal Information Protection Act 1998* (NSW) gives the NSW Police an exemption from the Information Protection Principles other than in relation to their administrative and educative

- A teenage girl suffers humiliation and distress upon finding out that she was secretly filmed while getting changed at a swimming pool. The girl has no means of seeking any civil compensation.²²
- A man left a copy of a video tape of him having sex with an ex-girlfriend with her father, showed the tape to another person and threatened to show it to her employee. The court concluded that there was no legal redress.²³

A general cause of action for the protection of privacy would provide legal recourse and potential remedies in these situations. It would also bring Australia into step with other common law jurisdictions such as the United Kingdom and New Zealand, as well as with most European nations. Finally, it would give effect to Australia's international obligations under Article 17 of the International Covenant on Civil and Political Rights.²⁴

Recommendation:

There should be a general statutory cause of action for invasion of privacy in Australia.

3. Should any cause of action for serious invasion of privacy be created by statute or be left to development at common law?

PIAC does not believe that the recognition of a cause of action for breach of privacy should be left to the incremental development by the courts of the common law. As a general principle, significant law reform should occur via the legislature. The failure of the legislature to act provides tacit encouragement to the judiciary to fill the legislative gap, thereby giving credence to Jeremy Bentham's tart description of the common law:

When your dog does anything you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way the judges make law for you and me. They won't tell a man beforehand what it is he should not do – they won't so much as allow of his being told: they lie by till he has done something which they say he should not have done, and then they hang him for it.²⁵

Furthermore, the creation of a statutory cause of action would provide greater certainty and clarity about rights and responsibilities as legislation. It would also allow respondents to understand the scope of their obligations, to predict whether or not their conduct will give rise to legal liability for breach of privacy and to put into place appropriate procedures to minimise the risk of a breach.

functions. See *HW v Commissioner of Police, New South Wales Police Service and Anor* [2003] NSWADT 214 and *GA v Police* [2005] NSWADT 121.

²² This is based on a real situation see <http://www.belfasttelegraph.co.uk/news/local-national/secretly-filmed-teen-girl-has-two-weeks-to-appeal-verdict-13482843.html> on 17 November 2011.

²³ *Giller v Procopets* [2004] VSC 113

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

²⁵ Jeremy Bentham, 'Truth versus Ashhurst' in (1823) 5 *Works of Jeremy Bentham* 231, 235.

It would also provide better protection of privacy as the cause of action could be drafted to properly protect privacy rights, as well as balancing those rights against other rights and interests, rather than trying to fit breaches of privacy into pre-existing legislation actions, such as breach of confidence. Similarly, it would provide a more flexible and tailored approach to damages and remedies.

A statutory cause of action for invasion of privacy is consistent with regimes that apply in New Zealand, as well as in some Canadian provinces (British Columbia,²⁶ Manitoba,²⁷ Saskatchewan²⁸ and Newfoundland²⁹).

However, in any event, the reluctance of superior courts to date to develop a tort of privacy in Australia³⁰ suggests that common law development of such a tort may take a long time, and may never happen at all.

4. Is 'highly offensive' an appropriate standard for a cause of action relating to serious invasions of privacy?

In our earlier submissions to both the ALRC and NSWLRC, PIAC argued that a more appropriate test of seriousness may be where the act complained of would be regarded as offensive to a reasonable person of ordinary sensibilities. PIAC took the view that the test of 'highly offensive' was too high and uncertain. In making this argument, PIAC referred to the comments of Nicholls LJ in *Campbell v MGN Ltd*:

[the] highly offensive formulation can all too easily bring into account, when deciding whether the disclosed information was private, considerations which go more properly to issues of proportionality; for instance, the degree of intrusion into private life, and the extent to which the publication was a matter of proper public concern. This could be a recipe for confusion.³¹

PIAC continues to hold this view. PIAC contends that an analogy can be made with the prohibition on racial vilification contained in s 18C of the *Racial Discrimination Act 1976* (Cth) (**RDA**). Like vilification, the introduction of a statutory cause of action for invasions of privacy implicitly recognises that freedom of speech may be legitimately restricted in some cases. The key issue then becomes the appropriate test to be applied in determining those cases.

PIAC notes that the test for racial vilification under the RDA is that the behaviour is 'not done in private and is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or group'. Significantly, s 18C does not require that the public act is 'highly

²⁶ *Privacy Act*, RSBC 1996, c 373 (British Columbia).

²⁷ *Privacy Act*, CCSM, 1987, cP125 (Manitoba).

²⁸ *Privacy Act*, RSS 1978, cP-24 (Saskatchewan).

²⁹ *Privacy Act*, RSNL 1996, cP-22 (Newfoundland).

³⁰ See for eg, *Giller v Procopets* [2004] VSC 113 and *Kalaba v Commonwealth of Australia* [2004] FCA 763 cf *Grosse v Purvis* (2003) QDC 151 and *Jane Doe v Australian Broadcasting Corporation and ors* [2007] VCC 281.

³¹ *Campbell v MGN Ltd* [2004] 2 AC 457 at [22].

offensive' or that the act was based on 'racial hatred'.³² Similarly, PIAC takes the view that it is neither necessary nor appropriate to restrict the proposed cause of action to 'highly offensive' invasions of privacy.

PIAC prefers the approach taken by the NSWLRC, which concluded that the question whether the conduct is 'highly offensive' may be a relevant consideration as part of the 'nature of conduct' but it should not form a separate limb of the threshold test.³³

Recommendation:

The legislation should provide that an individual has a cause of action against another person for invasion of privacy if she/he can show that the other person invaded her/his that the individual was reasonably entitled to expect in all the circumstances.

The legislation should provide that in considering whether there has been an invasion, relevant considerations include:

- a. The nature of the subject matter that it is alleged should be private;*
- b. The nature of the conduct concerned (including the extent to which a reasonable person of ordinary sensibilities would consider the conduct to be offensive);*
- c. The extent to which the individual has a public profile;*
- d. The extent to which the individual is or was in a position of vulnerability;*
- e. The conduct of the individual and of the alleged wrongdoer both before and after the conduct concerned (including offer to make amends or an apology);*
- f. The effect of the conduct on the health, welfare and emotional well-being of the individual;*
- g. Whether the conduct concerned contravened a provision of a statute of an Australian jurisdiction; and*
- h. Any other relevant matter.*

5. Should the balancing of interests in any proposed cause of action be integrated into the cause of action (ALRC or NSWLR) or constitute a separate defence (VLRC)?

PIAC agrees that the right to privacy is not an absolute right and that it should, in certain circumstances, give way to certain countervailing rights and obligations such as the right to freedom of expression and national security. However, it should not be forgotten that there is also a significant 'public interest' in maintaining privacy and upholding confidences.³⁴

³² For a review of the legislative history of s 18C of the *Racial Discrimination Act 1976* (Cth) see *Eaocock & Ors v Bolt* [2011] FCA 1103, Bromberg J at [191]-[206]. Although, the threshold test has been the subject of criticism, see for eg, Dan Meagher, 'So Far So Good?: A Critical Evaluation of Racial Vilification Laws in Australia', [2]4 Federal Law Review 10.

³³ NSWLRC, above n 6, [5.9], [5.11].

³⁴ See, eg, *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, per Lord Keith of Kinkell at 2.

In determining how the different rights and interests should be balanced against one another, PIAC prefers the approach taken by the VLRC, namely that the balancing of interests should constitute a defence to a prima facie case for invasion of privacy.

PIAC contends that there are two problems with the alternative approach of incorporating a balancing test into the cause of action itself. First, it places an unreasonably onerous evidentiary burden on plaintiffs and is likely to discourage the bringing of claims under the statute. Further, the question of balancing countervailing public interests really only arises where the respondent seeks to rely on a public interest defence.

Recommendation:

One of the defences to the proposed cause of action should be that the respondent's conduct was in the public interest, where public interest is a limited concept and not any matter that the public may be interested in.

6. How best could a statutory cause of action recognise the public interest in freedom of expression?

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

However, as noted above in response to Question 5, freedom of expression is not absolute and needs to be balanced against the right to privacy. PIAC takes the view that the most appropriate place for this balancing process to take place is as a separate defence.

PIAC notes that some jurisdictions take into account the 'newsworthiness' of information when considering whether or not the right to freedom of expression should qualify the right to privacy.³⁵ PIAC considers that this test is too broad, and risks privileging freedom of expression over privacy to the extent that a statutory cause of action for the protection of privacy could be rendered meaningless.

It is important to distinguish between whether it is in the public interest to make something known, or whether it is simply 'interesting' to the public to make something known. PIAC favours a 'legitimate public concern' test as was applied in the New Zealand case of *Hosking v Runting* [2005] 1 NZLR 1. This test considers whether there is legitimate public concern in the information or material to justify publication and whether in the circumstances those to whom publication is made can reasonably be said to have a right to be informed of it.³⁶

³⁵ The general approach in the United States, driven by the First Amendment, permits the publication of 'newsworthy information'. The *Privacy Act* RSS 1978 cP-24 (Saskatchewan) s 4(1)(e) contains a defence that the violation was necessary and incidental to newsgathering and reasonable in the circumstances.

³⁶ *Hosking v Runting* [2005] 1 NZLR 1 [133] – [134].

7. Is the inclusion of ‘intentional’ or ‘reckless’ as fault elements for any proposed cause of action appropriate, or should it contain different requirements as to fault?

PIAC reiterates the comments it made in its earlier submission to the ALRC about this issue:

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 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.³⁷

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.

Finally, PIAC notes that the VLRC agreed that there may be some cases where the invasion of privacy was caused by a negligent act but it is still sufficiently serious that it should be protected under the proposed cause of action.³⁸

Recommendation:

The proposed cause of action should not be limited to intentional or reckless acts.

8. Should any legislation allow for the consideration of other relevant matters, and, if so, is the list of matters proposed by the NSWLRC necessary and sufficient?

³⁷ Mainsbridge, above n 4, 24-26.

³⁸ VLRC, above n 5, [7.143].

PIAC takes the view that it would be useful to include a list of relevant considerations when determining whether there has been a breach of privacy.

Broadly speaking, PIAC supports the proposed list of considerations put forward by the NSWLRC.³⁹ In particular, PIAC strongly agrees with proposed 74(3)(a)(v), namely that the individual is or was in a position of vulnerability, should be taken into account when determining if there has been an invasion of privacy.

On the other hand, PIAC is concerned about the suggestion that the relationship between the individual and wrongdoer should be a consideration under proposed 74(3)(a)(iii). PIAC is not convinced that the relationship between the parties should dictate whether there is a reasonable expectation of privacy. Taking the example given by the NSWLRC that there is more likely to be an expectation of privacy as between a couple in a stable relationship than between two people engaged in an adulterous relationship as to whether their sex life should remain private, PIAC does not believe that such clear cut distinctions can be made on the basis of the relationship between the parties. For example, should a patient have a different expectation about the privacy of the health information that she provides to a medical clinic that she attends once as opposed to health records that are in the possession of her regular doctor? PIAC contends that the more important considerations in both examples are adequately covered by the other considerations contained in the proposed list.

Finally, PIAC suggests that consideration be given to adding an additional consideration allowing a court to take into account whether the breach of privacy was systemic, repeated or ongoing.

Recommendation:

The legislation should provide that in considering whether there has been an invasion, relevant considerations include:

- a. the nature of the subject matter that it is alleged should be private;*
- b. the nature of the conduct concerned (including the extent to which a reasonable person of ordinary sensibilities would consider the conduct to be offensive);*
- c. the extent to which the individual has a public profile;*
- d. the extent to which the individual is or was in a position of vulnerability;*
- e. the conduct of the individual and of the alleged wrongdoer both before and after the conduct concerned including offer to make amends or an apology);*
- f. the effect of the conduct on the health, welfare and emotional well-being of the individual;*
- g. whether the conduct concerned contravened a provision of a statute of an Australian jurisdiction;*
- h. whether the conduct concerned is systemic, repeated or ongoing; and*
- i. any other relevant matter.*

9. Should a non-exhaustive list of activities which could constitute an invasion of privacy be included in the legislation creating a

³⁹ NSWLRC, above n 6, 35-45.

statutory cause of action, or in other explanatory material? If a list were to be included, should any changes be made to the list proposed by the ALRC?

In our earlier submission to the ALRC, PIAC supported the inclusion of non-exhaustive list of the types of conduct that might amount to invasions of privacy on the basis that such a list would provide 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 made the following comments:

PIAC is concerned that the wording of (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*⁴⁰ 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 takes the view that (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 the material by the media).

Finally, PIAC submits that (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.⁴¹

Recommendation:

The proposed cause of action should also include a non-exhaustive list of what may constitute an invasion of privacy, including:

- (a) interference with an individual's home or family life;*
- (b) being subjected to unauthorised surveillance or that surveillance being disclosed or published;*
- (c) interference with an individual's written or electronic correspondence; and*
- (d) sensitive facts relating to an individual's private life being disclosed.*

10. What should be included as defences to any proposed cause of action?

⁴⁰ [2003] QDC 151.

⁴¹ Mainsbridge, above n 4, 23-24.

Subject to the comments below about consent, PIAC supports the list of defences contained in the VLRC report.⁴² In particular, PIAC agrees with the VLRC's recommendation that the public interest defence should specify that 'public interest is a limited concept and not any matter the public may be interested in'.⁴³

In relation to the issue of consent, PIAC suggests that this issue should form part of the cause of action rather than a defence. This was the approach adopted by both the ALRC⁴⁴ and the NSWLRC.⁴⁵ However, as PIAC noted in its earlier submission to the NSWLRC, the issue of consent is complex. It is important to recognise that some people may have limited or no capacity to give or refuse consent (in a meaningful sense) to an invasion of privacy. For example, minors, people in detention, people with intellectual disability and people with mental illness may face barriers in exercising their privacy rights, including consent. Similarly, where (as is often the case) consent is sought through the fine print of a contract that is unlikely to be considered with care by a consumer, consent becomes illusory.

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

PIAC notes that in some circumstances, it may actually be impossible to refuse consent to what is potentially a breach of privacy. For example, one cannot meaningfully consent, or refuse, to being subjected to video surveillance when standing in a lift or using an automatic teller machine. In most, if not all such circumstances, there is no alternative to using the particular facility to access services.

⁴² VLRC, above n 5, 7-1.149-7.150.

⁴³ VLRC, n 5 above, 7.187.

⁴⁴ ALRC, above n 12, 74.159.

⁴⁵ NSWLRC, above n 6, 46.

Recommendation:

The legislation should provide that all of the following are defences to a prima facie invasion of a person's privacy:

- *The alleged wrong-doer's conduct was incidental to the lawful right of defence of person or property, and was a reasonable and proportionate response to the threatened harm;*
- *The alleged wrong-doer's conduct was authorised or required by law;*
- *The alleged wrong-doer is a police or public officer who was engaged in his/her duty and his/her conduct was neither disproportionate to the matter being investigated nor committed in the course of a trespass;*
- *The alleged wrong-doer's conduct was in the public interest, where public interest is a limited concept and not any matter that the public may be interested in.*

The legislation should provide that there will not be an invasion of privacy if the individual has provided full and informed consent to the invasion of privacy.

11. Should particular organisations or types of organisations be excluded from the ambit of any proposed cause of action, or should defences be used to restrict its application?

PIAC strongly disagrees with the suggestion that particular organisations or types of organisations should be automatically excluded from the operation of the proposed cause of action. There seems no principled justification for such a general 'carve out'. Furthermore, PIAC notes that none of the ALRC, NSWLRC nor the VLRC supported this proposal.

12. Are the remedies recommended by the ALRC necessary and sufficient for, and appropriate to, the proposed cause of action?

PIAC supports the inclusion of a broad list of remedies such as that put forward by the ALRC. 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.

In relation to the ALRC's proposed list of remedies, PIAC opposes (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.

Whereas, 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 make provision for the enforcement of these non-monetary orders. PIAC notes that non-monetary orders of the NSW Administrative Decisions Tribunal (**ADT**) can be enforced as a judgment of the Supreme Court once the

Registrar of the ADT has filed a certificate setting out the terms of the order.⁴⁶ There is also provision in s 108(7) of the *Anti-Discrimination Act 1977* (NSW) (**ADA**) for the 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 would greatly strengthen a cause of action for invasion of privacy.

Systemic Breaches

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

PIAC recommends the inclusion of a remedy that expressly gives the court power to order implementation of policy or procedures to protect against repetition of the breach. PIAC notes that there is provision in s 108(2)(e) of the ADA 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.

Recommendation:

The legislation should provide that the court (or tribunal) is empowered to choose the remedy, which can include one or more of the following remedies:

- (a) damages;*
- (b) an account of profits;*
- (c) an injunction;*
- (d) an order requiring the respondent to apologise to the claimant;*
- (e) a correction order;*
- (f) delivery up and destruction of material;*
- (g) declaration;*
- (h) an order requiring an alleged wrong-doer to implement a policy or procedures to protect against repetition of the breach.*

13. Should the legislation prescribe a maximum award of damages for non-economic loss, and if so, what should that limit be?

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

However if damages are to be limited, they should be set in accordance with defamation legislation, given that this protects an analogous right. For example, the *Defamation Act 2005*

⁴⁶ *Anti-Discrimination Act 1977* (NSW) s 114.

(NSW) provides that the maximum amount of damages for non-economic loss that may be awarded is \$250,000.⁴⁷

Recommendation:

The legislation should not include a cap on the amount of damages that could be awarded for non-economic loss because of an invasion of privacy.

14. Should any proposed cause of action require proof of damage? If so, how should damage be defined for the purposes of the cause of action?

PIAC contends that 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. This is unsurprising: privacy is a human right. As such, it is designed to protect a facet of one's individual dignity – a concept that is difficult to quantify, but no less important because of that fact.

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*.⁴⁸ This was also the approach recommended by the ALRC, NSWLRC and VLRC. PIAC supports this approach. Privacy is a fundamental human right; it should not be necessary to prove damage arising from its breach.

Recommendation:

The legislation should provide that the cause of actionable without proof of damage.

16. Should any proposed cause of action be restricted to natural persons?

PIAC submits that the proposed cause of action should be limited to natural persons. In this regard, PIAC endorses the approach of the ALRC on this question. 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.

⁴⁷ *Defamation Act 2005* (NSW), s 35(1).

⁴⁸ *Privacy Act* RSB 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).

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

Some forms of corporate activity are private. For example neither members of the public, nor even shareholders, are ordinarily entitled to attend directors' meetings... However, the foundation of much of what is protected, where rights or privacy, as distinct from rights of property, are acknowledged, in human dignity. This may be incongruous when applied to a corporation.⁴⁹

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.⁵⁰

Recommendation:

The proposed cause of action should be limited to natural persons.

17. Should any proposed cause of action be restricted to living persons?

PIAC notes that most existing statutory causes of action for invasion of privacy lapse with the death of the person whose privacy has allegedly been invaded.⁵¹ This can be seen as flowing from the fact that the right to privacy is generally seen as a personal right. It has also been justified on the basis that because the main mischief of an invasion of privacy is the mental harm and injured feelings suffered by an individual, only living individuals should be allowed to seek relief.⁵²

However, some actions may have a considerable impact on the privacy of the relatives of a deceased person (for example, the taking of photographs of their remains, or the publication of an article containing embarrassing information about their private life, or the manner in which they died). In these circumstances, it is appropriate that the relatives of the deceased person have some means of seeking compensation, or restraining further breaches of privacy. PIAC notes that in France, the right to privacy survives the death of the aggrieved and may be enforced by the family of deceased.⁵³

⁴⁹ *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]).

⁵⁰ 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.

⁵¹ *Privacy Act* RSBC 1996 c373 (British Columbia) s 5; *Privacy Act* RSNL 1990 cP-22 (Newfoundland and Labrador) s 11; *Privacy Act* RSS 1978 cP-24 (Saskatchewan) s 10; and *Privacy Bill 2006* (Ireland) cl 15.

⁵² Hong Kong Law Reform Commission, *Civil Liability for Invasion of Privacy* (2004) Recommendation 29 [12.24].

⁵³ A Gigante, 'Ice Patch on the information superhighway: foreign liability for domestically created content' (1996) *Cardozo Arts and Entertainment Law Journal* 523 at 543, note 113.

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

Although it will rarely be appropriate for the estate to be awarded damages, the larger issues of principle which are involved should not die with the complainant. For example, policies or practices applied to the complainant may need to be changed so that discrimination does not occur in the future.⁵⁴

There is now provision in the ADA for a complaint to survive the death of a complainant and for the legal personal representative of the complainant to continue carriage of the complaint.⁵⁵ PIAC suggests that consideration be given to including a similar provision in any legislation setting up a statutory cause of action for invasion of privacy, so that an action can be maintained after a person's death, at least in circumstances where important systemic issues are involved.

Recommendation

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

19. Which forums should have jurisdiction to hear and determine claims made for serious invasion of privacy?

PIAC agrees with the ALRC's proposal that the Commonwealth government should enact a new federal statute for enacting a cause of action for serious invasions of privacy.⁵⁶ This legislation should also make it clear that it extinguishes any common law privacy rights but is in addition to any other privacy rights contained in state or territory legislation. If individual states and territories enact their own legislation dealing with invasions of privacy, there is a danger that levels of protection will be uneven across Australia. This would perpetuate the random, haphazard development that has been a feature of data protection laws and would create confusion and uncertainty for the many organisations and agencies that operate across state borders.

In determining which court or tribunal should hear these matters, 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 preserve of 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.

In PIAC's experience, even where *pro bono* legal representation or representation on a conditional fee basis is secured, many meritorious cases do not proceed due to the risk of an adverse costs order. This is especially the case in matters where there is a great disparity in resources between the applicant and respondent.

⁵⁴ New South Wales Anti-Discrimination Board, Submission to the New South Wales Law Reform Commission on Review of the Anti-Discrimination Act 1977 (NSW), Submission 1 (May 1994) at 182.

⁵⁵ *Anti-Discrimination Act 1977* (NSW) s 93(1).

⁵⁶ ALRC, above n12, 74.168.

One possibility is that the legislation should provide that invasion of privacy matters should be heard by the Administrative Appeals Tribunal. This would mean that parties to the cause of action would generally bear their own costs and that costs orders would only be made in exceptional circumstances.⁵⁷ PIAC notes that the VLRC recommended that the Victorian Civil and Administrative Tribunal be given jurisdiction to hear privacy complaints for similar reasons.⁵⁸

Alternatively, if the Government decided that invasion of privacy cases should be dealt with by the federal courts it should include a provision in the legislation that specifically allows the federal courts to make orders that protect litigants bringing action in the public interest from an adverse costs order. In 1995, the ALRC proposed the introduction of a public interest costs rule.⁵⁹ PIAC supports such a provision because it would remove a further barrier that inhibits impecunious people, and organisations bringing public interest proceedings, from litigating.

Recommendation:

The proposed cause of action should be contained in federal legislation. This legislation should also state that it abolishes any tort for the invasion or violation of privacy that may have existed at general law.

The jurisdiction to hear matters for invasion of privacy should be vested in the Administrative Appeals Tribunal and that the general rule in these proceedings should be that each party must bear its own costs.

Alternatively, if jurisdiction is given to the federal courts the legislation should include a provision that specifically allows the federal courts to make orders that protect litigants bringing action in the public interest from an adverse costs order.

⁵⁷ General Practice Direction 2007 under ss 20(2) of the Administrative Appeals Tribunal Act 1975, ss20(2)] states: 'In general, the parties in Tribunal proceedings must bear their own costs.'

⁵⁸ VLRC, above n5, 7.122.

⁵⁹ Australian Law Reform Commission, *Cost shifting – who pays for litigation*, ALRC Report 75 (1995). For further explanation of this proposal, see PIAC's recent submission to the NSW Law Reform Commission, *A public interest approach to costs*, NSW Law Reform Commission Inquiry <http://www.piac.asn.au/sites/default/files/publications/extras/10.03.03-PIAC_Sub1-NSWLRC_re_Costs.pdf> at 1 November 2011, 4-7.

Summary of recommendations⁶⁰

1. There should be a general statutory cause of action for invasion of privacy in Australia.
2. The proposed cause of action should be contained in federal legislation. It should also abolish any tort for the invasion or violation of privacy that may have existed at general law.
3. The legislation should provide that the cause of action is actionable without proof of damage.
4. The legislation should provide that an individual has a cause of action against another person for invasion of privacy if she/he can show that the other person invaded her/his that the individual was reasonably entitled to expect in all the circumstances.
5. The legislation should provide that in considering whether there has been an invasion, relevant considerations include:
 - a. the nature of the subject matter that it is alleged should be private;
 - b. the nature of the conduct concerned (including the extent to which a reasonable person of ordinary sensibilities would consider the conduct to be offensive);
 - c. the extent to which the individual has a public profile;
 - d. the extent to which the individual is or was in a position of vulnerability;
 - e. the conduct of the individual and of the alleged wrongdoer both before and after the conduct concerned (including offer to make amends or an apology);
 - f. the effect of the conduct on the health, welfare and emotional well-being of the individual;
 - g. whether the conduct concerned contravened a provision of a statute of an Australian jurisdiction;
 - h. whether the conduct concerned is systemic, repeated or ongoing; and
 - i. any other relevant matter.
6. The legislation should provide that there will not be an invasion of privacy if the individual has provided full and informed consent to the invasion of privacy.
7. The proposed cause of action should also include a non-exhaustive list of what may constitute an invasion of privacy, including:

⁶⁰ It should be noted that the summary of recommendations does not reflect the order in which these recommendations appear in the body of the submission. Instead they have been reordered to reflect how a proposed cause of action might be drafted as per the recommendations that PIAC makes in its submission.

- (a) interference with an individual's home or family life;
 - (b) being subjected to unauthorised surveillance or that surveillance being disclosed or published;
 - (c) interference with an individual's written or electronic correspondence; and
 - (d) sensitive facts relating to an individual's private life being disclosed.
8. The proposed cause of action should not be limited to intentional or reckless acts.
9. The legislation should provide that all of the following are defences to a prima facie invasion of a person's privacy:
- a. The alleged wrong-doer's conduct was incidental to the lawful right of defence of person or property, and was a reasonable and proportionate response to the threatened harm;
 - b. The alleged wrong-doer's conduct was authorised or required by law;
 - c. The alleged wrong-doer is a police or public officer who was engaged in his/her duty and his/her conduct was neither disproportionate to the matter being investigated nor committed in the course of a trespass;
 - d. The alleged wrong-doers conduct was in the public interest, was in the public interest, where public interest is a limited concept and not any matter that the public may be interested in.
10. The proposed cause of action should be limited to natural persons.
11. In exceptional circumstances, an action for invasion of privacy should be able to continue after the death of the person whose privacy has been invaded, at least where important systemic issues are involved.
12. The legislation should provide that the court (or tribunal) is empowered to choose the remedy, which can include one or more of the following remedies:
- a. damages;
 - b. an account of profits;
 - c. an injunction;
 - d. an order requiring the respondent to apologise to the claimant;
 - e. a correction order;
 - f. delivery up and destruction of material;
 - g. declaration;
 - h. an order requiring an alleged wrong-doer to implement a policy or procedures to protect against repetition of the breach.
13. The legislation should not include a cap on the amount of damages that could be awarded for non-economic loss because of an invasion of privacy.
14. The jurisdiction to hear matters for invasion of privacy should be vested in the Administrative Appeals Tribunal and that the general rule in these proceedings should be that each party must bear its own costs.

- b. Alternatively, if jurisdiction is given to the federal courts the legislation should include a provision that specifically allows the federal courts to make orders that protect litigants bringing action in the public interest from an adverse costs order.