Public Interest Advocacy Centre

Submission to Discussion Paper on the Review of the Privacy Act 1988

December 2021

Public Interest Advocacy Centre
ABN 77 002 773 524
www.piac.asn.au

Gadigal Country
Level 5, 175 Liverpool St
Sydney NSW 2000
Phone +61 2 8898 6500
Fax +61 2 8898 6555

About the Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is a leading social justice law and policy centre. Established in 1982, we are an independent, non-profit organisation that works with people and communities who are marginalised and facing disadvantage.

PIAC builds a fairer, stronger society by helping to change laws, policies and practices that cause injustice and inequality. Our work combines:

- legal advice and representation, specialising in test cases and strategic casework;
- research, analysis and policy development; and
- advocacy for systems change and public interest outcomes.

Our priorities include:

- Reducing homelessness, through the Homeless Persons' Legal Service
- Access for people with disability to basic services like public transport, financial services, media and digital technologies
- Justice for First Nations people
- Access to sustainable and affordable energy and water (the Energy and Water Consumers' Advocacy Program)
- Fair use of police powers
- Rights of people in detention, including equal access to health care for asylum seekers (the Asylum Seeker Health Rights Project)
- Improving outcomes for people under the National Disability Insurance Scheme
- Truth-telling and government accountability
- Climate change and social justice.

Contact

Sheetal Balakrishnan
Public Interest Advocacy Centre
Level 5, 175 Liverpool St
Sydney NSW 2000

T: 0432 189 163
E: sbalakrishnan@piac.asn.au

Website: www.piac.asn.au

Public Interest Advocacy Centre

@PIACnews

The Public Interest Advocacy Centre office is located on the land of the Gadigal of the Eora Nation.

Contents

1. List of recommendations

Recommendation 1: Amend the objects in subsection 2A(b) as proposed

PIAC supports proposal 1.1 to amend subsection 2A(b) to clarify that the protection of privacy should only be balanced against those interests of entities which are 'undertaken in the public interest'. The meaning of 'public interest' should be construed as a limited concept and not as any matter that the public may be interested in. For example, the 'public interest' may include freedom of expression, the implied freedom of political communication, freedom of the media to investigate and report on matters of public concern, the proper administration of government, open justice, public health and safety and national security.

Recommendation 2: Strengthen the objects in section 2A to provide for redress for individuals

Add to subsection 2A(g) or insert a new subsection to include that the objects of the Privacy Act are to provide redress for individuals whose privacy has been subject to arbitrary or unlawful interference.

Recommendation 3: Amend the definition of 'personal information' as proposed

PIAC supports proposals 2.1 to 2.3 to amend the definition of 'personal information' to make clear that it includes technical and inferred personal information.

Recommendation 4: Amend the definition of 'collection' as proposed

PIAC supports proposal 2.4 to amend the definition of 'collection' to expressly cover information obtained from any source and by any means, including inferred or generated information.

Recommendation 5: Define 'consent' in the Privacy Act as proposed

PIAC supports proposal 9.1 to define 'consent' in the Privacy Act as being voluntary, informed, current, specific and an unambiguous indication through clear action.

Recommendation 6: Clearly define the elements of 'consent' in the Privacy Act and in the APP guidelines

PIAC recommends that the Privacy Act introduce and define the following elements of 'consent': voluntary, informed, current, specific and unambiguous indication through clear action. Further guidance on the interpretation of these terms can be provided in the APP guidelines.

Recommendation 7: Introduce standardised consent requests for all APP entities

PIAC recommends the introduction of standardised consents to ensure consistency for the public and to facilitate comprehension and decision-making of consent requests. Standardised consents should be implemented for all APP entities and could be rolled-out in phases based on the type of organisation.

Recommendation 8: Collection, use or disclosure of personal information must be fair and reasonable as proposed

PIAC supports proposal 10.1 so that collection, use or disclosure of personal information under APP 3 and APP 6 must be fair and reasonable.

Recommendation 9: Introduce legislated factors to assess whether a collection, use or disclosure is fair and reasonable

PIAC supports proposal 10.2 to legislate factors relevant to whether a collection, use or disclosure of personal information is fair and reasonable. In addition to the factors proposed in the Discussion Paper, PIAC recommends that the legislated factors should include the following three additional factors: the sensitivity of the personal information having regard to marginalised communities; any other circumstances of vulnerability; and regard for the objects of the Privacy Act, including balancing any public interests.

Recommendation 10: Develop Commissioner-issued guidance to detail circumstances in which a collection, use or disclosure would not be fair and reasonable

PIAC recommends the development of Commissioner-issued guidance to further detail circumstances in which a collection, use or disclosure would not be fair and reasonable. The Commissioner-issued guidance should be based on the 'no-go zones' guidance issued by the Office of the Privacy Commissioner of Canada and adapted for an Australian context. The guidelines should be issued following appropriate public consultation.

Recommendation 11: APP entities must satisfy each legislated factor of the fair and reasonable test

Rather than the factors being interpretative considerations in determining whether something is, in its entirety, fair and reasonable, PIAC recommends that APP entities must satisfy each legislated factor of the fair and reasonable test.

Recommendation 12: Define 'primary purpose' and 'secondary purpose' as proposed

PIAC supports proposal 10.4 to define a 'primary purpose' as the purpose for the original collection, as notified to the individual and to define a 'secondary purpose' as a purpose that is directly related to, and reasonably necessary to support the primary purpose.

Recommendation 13: Insert a provision in the Privacy Act providing for consent to lapse

PIAC recommends that when obtaining consent, APP entities should specify how long the consent will be valid for. PIAC recommends amending the Privacy Act to provide for circumstances where consent is not withdrawn and it is not clear how long consent is given for, the consent should lapse after a defined period. The period after which consent lapses ought to be by reference to what would be within the reasonable expectations of the person giving consent, in consideration of the particular circumstances.

Recommendation 14: A direct right of action should be available to any individual or group of individuals as proposed

PIAC supports the proposal for a direct right of action to be available to any individual or group of individuals whose privacy has been interfered with by an APP entity.

Recommendation 15: The forum for a direct right of action be the FCA or the FCFCOA as proposed

PIAC supports the proposal that the appropriate forum for a direct right of action be the FCA or the FCFCOA.

Recommendation 16: A 'small claims procedure' be created for privacy matters in the FCFCOA

PIAC supports the proposal that a 'small claims procedure' be created as an option for the hearing of certain privacy matters in the FCFCOA, and modelled on existing 'small claims' regimes. Rules should be developed to establish the threshold for privacy matters which may be heard under the 'small claims procedure'.

Recommendation 17: Applicants should not be required to first make a complaint as a 'gateway' to the direct right of action

PIAC does not support the proposal that an applicant would first need to make a complaint to the OAIC (or other complaint handling body) and have their complaint assessed for suitability for conciliation either by the OAIC or a recognised external dispute resolution scheme.

Recommendation 18: Applicants should not be required to seek leave to make an application for a breach of privacy claim

PIAC does not support the proposal that an applicant would need to seek leave of the court to make an application for a claim of a privacy breach.

Recommendation 19: Applicants should be able to elect between seeking conciliation through the OAIC, or applying directly and unconditionally to the courts

PIAC recommends that applicants should be able to elect between seeking conciliation through the OAIC, or applying directly and unconditionally to the courts.

Recommendation 20: A direct right of action should not be limited by a 'harm threshold'

PIAC does not support introducing a 'harm threshold' and to limit the direct right of action only to 'serious interferences' of the Privacy Act.

Recommendation 21: The OAIC should have the ability to appear as amicus curiae

PIAC agrees with the proposal that the OAIC would have the ability, subject to leave being granted by the court, to appear as amicus curiae to assist the court, but not to provide expert evidence.

Recommendation 22: The Information Commissioner ought to be granted the power to intervene, not the Commonwealth Attorney-General

PIAC does not support the proposal for the Commonwealth Attorney-General to be granted the power to intervene. Instead, the Information Commissioner ought to be given the intervener function, subject to leave being granted by the court and any conditions imposed by the court.

Recommendation 23: A range of remedies should be available, including any amount of damages

PIAC supports the proposal that available remedies would be any order the court sees fit, including any amount of damages.

Recommendation 24: Introduce a statutory tort for invasion of privacy

PIAC supports option 1 to introduce a statutory tort for invasion of privacy based on the ALRC's model with PIAC's additional recommendations.

Recommendation 25: Introduce a legislated non-exhaustive list of examples of invasions of privacy

PIAC recommends that there should be a legislated non-exhaustive list of examples of conduct that may be an invasion of privacy.

Recommendation 26: 'Intrusion upon seclusion' should extend to physical privacy intrusions such as unreasonable search and seizure or media harassment

PIAC recommends that 'intrusion upon seclusion' should extend to physical privacy intrusions such as unreasonable search and seizure, or media harassment.

Recommendation 27: The extent to which the plaintiff is in a position of vulnerability should be relevant to whether there is a reasonable expectation of privacy

PIAC recommends that the non-exhaustive list of matters to determine whether there is a reasonable expectation of privacy should include the extent to which the plaintiff is in a position of vulnerability.

Recommendation 28: 'Seriousness' should not be a standalone element of the action

PIAC does not support the ALRC's recommendation that 'seriousness' should be a separate standalone element of the action to be established by the plaintiff. Instead, PIAC recommends that 'seriousness' should be considered as part of the nature of the conduct. Consideration as to the seriousness of the cause of action should be by reference to an objective standard.

Recommendation 29: The tort should extend to intentional, reckless or negligent invasions of privacy

PIAC does not support the ALRC's recommendation that the tort should be confined to intentional or reckless invasions of privacy. PIAC recommends that the tort should extend to negligent invasions of privacy. Alternatively, PIAC recommends that the tort extend to negligent invasions of privacy committed by government entities or corporations with individuals only liable for intentional or reckless conduct.

Recommendation 30: Specific countervailing public interests should be raised as a defence rather than an element of the cause of action

PIAC does not support the ALRC's recommendation that a plaintiff would need to establish that the public interest in privacy outweighs any countervailing public interest. Instead, PIAC recommends that it would be more appropriate for competing public interests to be a defence to the cause of action. PIAC also recommends that the legislation specify that the 'public interest is a limited concept and not any matter the public is interested in' and supports the inclusion of a legislated non-exhaustive list of public interest matters.

Recommendation 31: If a 'public interest' defence were to be introduced, there would be no place for a defence of 'necessity'

If a 'public interest' defence were to be introduced, PIAC considers that there would be no place for also including a defence of 'necessity'.

Recommendation 32: Exemptions from the cause of action should be limited

PIAC recommends against the inclusion of wide categories of activities, organisations or types of activities or organisations that are automatically exempt from the operation of the cause of action.

Recommendation 33: There should be no cap imposed for damages for non-economic loss and exemplary damages

PIAC does not support the ALRC's recommendation to impose a cap for damages for non-economic loss and any exemplary damages. If damages are to be limited, PIAC supports them being set in accordance with defamation legislation.

Recommendation 34: A minimalist statutory tort should only be introduced if option 1 is not adopted

PIAC would only recommend option 2 (minimalist statutory tort) if option 1 (ALRC's statutory tort model with PIAC's additional recommendations) is not adopted, noting that we do not consider option 2 to be a substitute to option 1.

Recommendation 35: Extending the Privacy Act to individuals would not be an adequate alternative to introducing a statutory tort

PIAC does not support option 3 (extending the Privacy Act to individuals) as an alternative to introducing a statutory tort.

Recommendation 36: Making damages for emotional distress available for actions for breach of confidence would not be an adequate alternative to introducing a statutory tort

PIAC does not support option 4 (making damages for emotional distress available for actions for breach of confidence) as an alternative to introducing a statutory tort.

Recommendation 37: The protections in the Privacy Act should be the minimum afforded in other Commonwealth schemes

As CDR for Energy is an existing scheme, rather than developing a non-binding privacy law design guide, PIAC recommends that the protections in the Privacy Act should be the minimum afforded in other Commonwealth schemes.

2. Introduction

PIAC welcomes the opportunity to respond to the proposals and questions in the Discussion Paper on the review of the *Privacy Act 1988* (Cth) (***Privacy Act***).

PIAC works with people and communities who are marginalised and facing disadvantage, and helps to change laws, policies and practices that cause injustice and inequality. As part of this work, we have a long history as a strong advocate for the protection of privacy rights of Australians and have contributed to the numerous reviews over the past two decades on privacy reform both at federal and state levels. In our work, we have consistently identified significant gaps in the legal framework for the protection of the right to privacy and have in a number of contexts recommended that a statutory cause of action to protect the right to privacy be enacted.

This submission draws on our work on previous related inquiries, including PIAC's earlier submission to the Attorney-General's Department in response to its Issues Paper on the review of the *Privacy Act* (**Issues Paper Submission**).

As we indicated in our Issues Paper Submission, the review of the *Privacy Act* must be situated within a broader context. This context includes the evolving digital economy, the emergence of new technologies and the increasing amount of time spent by Australians online, all resulting in the increased collection of personal information. Further, the *Data Availability and Transparency Bill 2020* (Cth) significantly expands the possible use and disclosure of an individual's personal information,[1] and in ways that could not reasonably be envisaged by an individual when providing their consent to the initial collection. Against the background of regular and significant data breaches of public and private sector data, the findings of the Office of the Australian Information Commissioner (**OAIC**)'s 2020 Australian Community Attitudes to Privacy Survey also provide relevant context.[2]

The review of the *Privacy Act* provides an opportunity for reform in areas of longstanding concern, including in relation to a direct right of action and a statutory tort for invasions of privacy. The opportunity is ripe for the introduction of a federal framework for a statutory tort, which will avoid creating an even more complex regulatory environment for businesses and individuals which may arise from a patchwork of state-based frameworks.

It also provides an opportunity to consider whether fundamental concepts within the *Privacy Act* – particularly in relation to its objects, the definition of personal information and consent – remains fit for purpose in an age of digital transformation.

Our submission is limited to the following proposals for reforms identified in the Discussion Paper:

- Objects of the *Privacy Act* (proposal 1.1);
- Definition of personal information (proposals 2.1 to 2.4);
- Consent to the collection, use and disclosure of personal information (proposals 9.1 to 9.2);
- Additional protections for collection, use and disclosure of personal information (proposals 10.1 to 10.4);

---

1 Explanatory Memorandum, Data Availability and Transparency Bill 2020 (Cth), Part 1, [17].

2 OAIC, *Australian Community Attitudes to Privacy Survey*, September 2020. For example, 83% of Australians would like the government to do more to protect the privacy of their data (page 65) and 61% of Australians identifying data security and data breaches as among the biggest privacy risks (page 6).

- Withdrawing consent (proposal 14.1);
- Direct right of action (proposal 25.1);
- Statutory tort of privacy (proposals 26.1 to 26.4); and
- Interactions with other schemes (proposal 28.1).

3. Objects of the *Privacy Act* (proposal 1.1)

The objects of the *Privacy Act* provide a lens for its interpretation. Subsection 2A(h) of the *Privacy Act* recognises Australia's international obligations in relation to privacy. The protection of privacy is recognised as a human right in the Universal Declaration of Human Rights and various international treaties to which Australia is a signatory.[3]

In the domestic context, the protection of privacy has been specifically enshrined in the human rights legislation of the Australian Capital Territory,[4] Queensland[5] and Victoria.[6] In the absence of a federal human right protecting privacy, PIAC submits that the objects of the *Privacy Act* must clearly recognise and give effect to the internationally recognised human right protecting privacy.

First, the human right protecting privacy is not an absolute right; it must accommodate certain other human rights and interests, including the freedom of expression and implied freedom of political communication. But as a fundamental human right, it would be inappropriate for the protection of privacy to be traded off against the interest of any particular entity with obligations under the *Privacy Act*. PIAC observes that the interests of entities should be aligned with and work in concert with the human right to protection of privacy.

Relevantly, the United Nations Human Rights Committee in its General Comment on Article 17 of the International Covenant on Civil and Political Rights provides that interferences to privacy 'must comply with the provisions, aims and objectives of the Covenant'.[7] The General Comment also provides that 'with regard to interferences that conform to the Covenant, relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted'.[8]

PIAC supports the proposal to amend subsection 2A(b) of the *Privacy Act* to clarify that the protection of privacy should only be balanced against those interests of entities which are 'undertaken in the 'public interest' (proposal 1.1). However, in light of the General Comment on Article 17 referred to above, we consider 'public interest' should be construed as a limited concept and not as any matter the public may be interested in. Specifically, the meaning of 'public interest' should align with 'the provisions, aims and objectives of the Covenant'. For example, the 'public interest' may include freedom of expression, the implied freedom of political communication, freedom of the media to investigate and report on matters of public concern, the proper administration of government, open justice, public health and safety and national security. By specifying 'the precise circumstances' in which the 'public interest' may be balanced against

---

3 See, for example, *Universal Declaration of Human Rights*, art 12; *International Covenant on Civil and Political Rights*, art 17; *Convention on the Rights of the Child*, art 16.
4 *Human Rights Act 2004* (ACT), s 12.
5 *Human Rights Act 2019* (Qld), s 25.
6 *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 13.
7 Human Rights Committee, *General Comment No 16: Article 17 (Right to Privacy) The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 33rd sess (8 April 1988), [3].
8 Ibid, [8].

the protection of privacy, the *Privacy Act* would more clearly recognise the international human right protecting privacy.

Second, PIAC observes that the objects of the *Privacy Act* provide a means for individuals to complain about an alleged interference with their privacy.[9] To strengthen this existing object, we maintain our Issues Paper Submission that the objects of the *Privacy Act* should be amended to include redress for individuals whose privacy has been subject to arbitrary or unlawful interference. This would reflect the proposal to enact a direct right of action and a statutory tort of privacy (see further below).

Recommendation 1: Amend the objects in subsection 2A(b) as proposed

PIAC supports proposal 1.1 to amend subsection 2A(b) to clarify that the protection of privacy should only be balanced against those interests of entities which are 'undertaken in the public interest'. The meaning of 'public interest' should be construed as a limited concept and not as any matter that the public may be interested in. For example, the 'public interest' may include freedom of expression, the implied freedom of political communication, freedom of the media to investigate and report on matters of public concern, the proper administration of government, open justice, public health and safety and national security.

Recommendation 2: Strengthen the objects in section 2A to provide for redress for individuals

Add to subsection 2A(g) or insert a new subsection to include that the objects of the Privacy Act are to provide redress for individuals whose privacy has been subject to arbitrary or unlawful interference.

4. Definition of personal information (proposals 2.1 to 2.4)

PIAC agrees with the Discussion Paper that there is a need for reform to address the current uncertainty about whether and how 'personal information' applies to technical and inferred information.[10]

PIAC supports clarifying the definition of personal information to ensure it captures all manners in which individuals are identified or can be reasonably identified. Therefore, we agree with proposals 2.1 to 2.3. In particular, we note that a non-exhaustive list of the types of information capable of falling within the new definition of personal information gives effect to the Australian Competition and Consumer Commission's (**ACCC**) recommendation to capture technical data.[11]

As we identified in the Issues Paper Submission, there is an emerging potential that smart household appliances are collecting a significant amount of data. This data, alone or with other data sources, could amount to 'inferred personal information'. PIAC submits that inferred personal information should be expressly included in the definition of personal information. This would bring such information within the protections of the *Privacy Act* framework and better empower consumers. The proposal to amend the definition of 'collection' to expressly cover

9 *Privacy Act 1988* (Cth), s 2A(g).
10 Discussion Paper, 26.
11 Australian Competition and Consumer Commission, *Digital Platforms Inquiry*, Final Report (June 2019) (**DPI Report**), Recommendation 16(a).

information obtained from any source and by any means, including inferred or generated information, would capture the collection of data from smart household appliances. Therefore, PIAC supports proposal 2.4.

Recommendation 3: Amend the definition of 'personal information' as proposed

PIAC supports proposals 2.1 to 2.3 to amend the definition of 'personal information' to make clear that it includes technical and inferred personal information.

Recommendation 4: Amend the definition of 'collection' as proposed

PIAC supports proposal 2.4 to amend the definition of 'collection' to expressly cover information obtained from any source and by any means, including inferred or generated information.

5. Consent to the collection, use and disclosure of personal information (proposals 9.1 to 9.2)

5.1 Strengthening the definition of consent and what is required to demonstrate consent

As submitted in our Issues Paper Submission, there is a need to clarify the definition of consent and improve the process of obtaining and demonstrating consent.[12]

The Discussion Paper refers to the proposal that the Online Privacy Code would require consent to be voluntary, informed, specific, current and unambiguous.[13] If introduced, application of the Online Privacy Code would be limited to certain organisations, including social media services and certain online platforms. However, issues with consent are not specific to social media services and online platforms. Some of the most sensitive personal information is that held by entities that would not be covered by the Online Privacy Code, such as government agencies and energy retailers. Notwithstanding the inclusion of these elements of 'consent' in the Online Privacy Code, these elements of 'consent' need to cover all Australian Privacy Principles (**APP**) entities. Therefore, PIAC supports proposal 9.1 for consent to be defined in the *Privacy Act* as being voluntary, informed, current, specific and an unambiguous indication through clear action. This would mean all APP entities would be captured by the enhanced definition of consent.

However, we consider that an enhanced definition of consent does not go far enough to address the concerns raised in our Issues Paper Submission regarding how to facilitate obtaining informed consent. In addition to the enhanced definition of consent, PIAC recommends that the following elements of 'consent' be introduced into the *Privacy Act*: voluntary, informed, current, specific and unambiguous indication through clear action. These terms should be clearly defined in the *Privacy Act*, with further guidance provided in the APP guidelines. For example, we submit the following:

- in the context of the element of 'voluntary' and bundled consent:
    - the consent process should have in place pro-consumer defaults. To this end, there should be opt-in boxes to ensure people are explicitly aware of what they are agreeing to, outside of the primary purpose for the collection;

12 PIAC, Issues Paper Submission (November 2020), 6-7.
13 Discussion Paper, 77.

    - ensure that if an individual refuses to consent to their personal information being collected, used or disclosed for a purpose that is not necessary or central to providing the relevant product or service, they are still able to access the service. To that end, the consent process must clearly state what personal information is required for the provision of the product or service, and what is not;
- to satisfy the element of 'voluntary', the consent process needs to inform people as to how they can withdraw consent (and ensure that the process for withdrawal of consent is easy);
- the element of 'specific', should be construed as requiring consent to be sought separately for each primary purpose;
- to satisfy the elements of 'informed', 'current' and 'specific', when obtaining consent, APP entities should specify how long the consent will be valid for; and
- the element of 'unambiguous indication through clear action' needs to be defined and/or with accompanying examples, so there is no doubt as to what is required to satisfy this element of consent.

The current APP guidelines and the explanations in the Discussion Paper provide a foundation for defining these terms in the *Privacy Act*.[14]

The above reforms would be of significant benefit to individuals who do not speak English as a first language, have a disability, or are otherwise disadvantaged.

Recommendation 5: Define 'consent' in the Privacy Act as proposed

PIAC supports proposal 9.1 to define 'consent' in the Privacy Act as being voluntary, informed, current, specific and an unambiguous indication through clear action.

Recommendation 6: Clearly define the elements of 'consent' in the Privacy Act and in the APP guidelines

PIAC recommends that the Privacy Act introduce and define the following elements of 'consent': voluntary, informed, current, specific and unambiguous indication through clear action. Further guidance on the interpretation of these terms can be provided in the APP guidelines.

5.2 Standardisation of consent requests

In principle, PIAC supports proposal 9.2 to introduce standardised consents to ensure consistency for the public and to facilitate comprehension and decision-making of consent requests. The Discussion Paper notes that standardised consent taxonomies could be introduced for the Online Privacy Code. For the same reasons as set out above, PIAC submits that standardised consents should not be limited to organisations subject to the Online Privacy Code, but should be implemented for all APP entities.

The Discussion Paper observes that due to the wide range of contexts and sectors in which the *Privacy Act* applies, standardisation may be impractical. Impracticalities may be addressed through standardised icons or phrases referring to categories of consents. Further, PIAC considers that the implementation of standardised consents could be rolled-out in phases, beginning with organisations subject to the Online Privacy Code and subsequently extended to capture all APP entities.

[14] OAIC, *Australian Privacy Principles guidelines: Privacy Act 1988* (22 July 2019) [B.34]-[B.51]; Discussion Paper, 77-78.

Recommendation 7: Introduce standardised consent requests for all APP entities

PIAC recommends the introduction of standardised consents to ensure consistency for the public and to facilitate comprehension and decision-making of consent requests. Standardised consents should be implemented for all APP entities and could be rolled-out in phases based on the type of organisation.

6. Additional protections for collection, use and disclosure of personal information (proposals 10.1 to 10.4)

6.1 Collection, use and disclosure of personal information must be fair and reasonable

PIAC agrees that additional protections should be introduced to regulate and limit collection, use and disclosure of personal information. As the Discussion Paper observes, the current framework places a large onus on individuals to self-manage their privacy.[15] PIAC agrees with the OAIC's submission that the burden of understanding and consenting to collection, use and disclosure of personal information should not fall on individuals, but must be supported by enhanced obligations for APP entities.[16] Therefore, a 'notice and consent regulatory model' is not sufficient to protect privacy and should not be exclusively relied upon to ensure that consumers are protected.

PIAC submits that there needs to be objective constraints to the collection, use and disclosure of personal information. The objective constraint should provide a baseline level of protection. PIAC supports that an adequate baseline protection would be an objective 'fair and reasonable' test. Therefore, we support proposal 10.1 to amend the *Privacy Act* so that collection, use or disclosure of personal information under APP 3 and APP 6 must be fair and reasonable.

PIAC submits that the *Privacy Act* must legislate factors to assist APP entities assess whether a collection, use or disclosure is 'fair and reasonable' (proposal 10.2). In addition to the factors proposed in the Discussion Paper, we consider that the legislated factors should include:

- the sensitivity of the personal information having regard to marginalised communities. For example, what is 'sensitive information' for an asylum seeker is likely to differ substantively from what is 'sensitive information' for an Australian citizen. Similar considerations would be relevant to sensitive information of other vulnerable communities, including First Nations people, people with disability and domestic violence victims. This is especially relevant to government collection of personal information as marginalised communities have disproportionately greater interactions with government services;
- any other circumstances of vulnerability, which could include the best interests of children; and
- regard to the objects of the *Privacy Act*, including balancing any public interests (proposal 1.1).

We also support the development of Commissioner-issued guidance to further detail circumstances in which a collection, use or disclosure would not be fair and reasonable. In this regard, PIAC is aware of the 'no-go zones' guidance issued by the Office of the Privacy

15 Discussion Paper, 81.
16 Discussion Paper, 82.

Commissioner of Canada in relation to six purposes which would generally be considered inappropriate for the collection, use or disclosure of personal information, regardless of consent.[17] Similar 'no-go zones' should be considered, adapted for an Australian context and made accessible to business, consumers and government agencies. As suggested in Chapter 11 of the Discussion Paper, following appropriate public consultation, the Commissioner should issue guidelines setting out categories of acts and practices that would not satisfy the fair and reasonable test.[18]

In response to the questions raised in the Discussion Paper, PIAC submits that APP entities should be required to satisfy each legislated factor of the fair and reasonable test.[19] If the factors were to be 'interpretative considerations in determining whether something is, in its entirety, fair and reasonable', there would be a risk that APP entities would weigh some factors more heavily than others, and in an inconsistent manner. Requiring each factor to be satisfied provides individuals with certainty as to how an APP entity will make the fair and reasonable assessment. We also do not consider the individual factors pose high thresholds (as mentioned above, the fair and reasonable test is intended to provide baseline protection). If, as PIAC proposes, one of the factors requires entities to have regard to the objects of the *Privacy Act*, in particular the proposed amendment to section 2A(b), this would ensure the fair and reasonable test strikes the right balance between the privacy of individuals, APP entities and the public interest.

Recommendation 8: Collection, use or disclosure of personal information must be fair and reasonable as proposed

PIAC supports proposal 10.1 so that collection, use or disclosure of personal information under APP 3 and APP 6 must be fair and reasonable.

Recommendation 9: Introduce legislated factors to assess whether a collection, use or disclosure is fair and reasonable

PIAC supports proposal 10.2 to legislate factors relevant to whether a collection, use or disclosure of personal information is fair and reasonable. In addition to the factors proposed in the Discussion Paper, PIAC recommends that the legislated factors should include the following three additional factors: the sensitivity of the personal information having regard to marginalised communities; any other circumstances of vulnerability; and regard for the objects of the Privacy Act, including balancing any public interests.

Recommendation 10: Develop Commissioner-issued guidance to detail circumstances in which a collection, use or disclosure would not be fair and reasonable

PIAC recommends the development of Commissioner-issued guidance to further detail circumstances in which a collection, use or disclosure would not be fair and reasonable. The Commissioner-issued guidance should be based on the 'no-go zones' guidance issued by the Office of the Privacy Commissioner of Canada and adapted for an Australian context. The guidelines should be issued following appropriate public consultation.

---

17 Office of the Privacy Commissioner of Canada, *Guidance on inappropriate data practices: Interpretation and application of subsection 5(3)*, May 2018 <https://www.priv.gc.ca/en/privacy-topics/collecting-personal-information/consent/gd_53_201805/>.

18 Discussion Paper, 97.

19 Discussion Paper, 91.

Recommendation 11: APP entities must satisfy each legislated factor of the fair and reasonable test

Rather than the factors being interpretative considerations in determining whether something is, in its entirety, fair and reasonable, PIAC recommends that APP entities must satisfy each legislated factor of the fair and reasonable test.

6.2 Defining primary and secondary purposes

PIAC supports the proposal to provide additional legislative certainty by defining 'primary purpose' and 'secondary purpose' (proposal 10.4). Additionally, such certainty would empower individuals to understand when their personal information will be collected, used or disclosed.

For example, consent procedures for the use of immigration detention medical records – where a person arriving in detention signs a consent form to say their information can be used to assist with their placement – have been criticised as inadequate for allowing a person's information to be used by the Department of Home Affairs for purposes other than a patient's health care.[20] Strengthening the definition of primary purpose and secondary purpose would go some way to protecting against the Department of Home Affairs using personal information for purposes other than a patient's health care.

Recommendation 12: Define 'primary purpose' and 'secondary purpose' as proposed

PIAC supports proposal 10.4 to define a 'primary purpose' as the purpose for the original collection, as notified to the individual and to define a 'secondary purpose' as a purpose that is directly related to, and reasonably necessary to support the primary purpose.

7. Withdrawing consent (proposal 14.1)

As the Discussion Paper identifies, an ability to object or withdraw consent would enable individuals to exercise control over the use or disclosure of their personal information, as privacy risks emerge over time.[21]

As noted above, when obtaining consent, APP entities should specify how long the consent will be valid for.

In addition to introducing a mechanism to enable individuals to request an APP entity to no longer use or disclose personal information, PIAC recommends that if consent is not withdrawn, and it is not clear how long the initial consent has been given for, the consent should lapse after a defined period. The period after which consent lapses ought to be by reference to what would be within the reasonable expectations of the person giving consent, considering the particular circumstances. This would acknowledge that consent must be current and specific. Further, this level of protection would give effect to the right to privacy protection and give individuals greater control over their personal information.

---

20 David Marr, Oliver Laughland and Bill Code, 'Asylum seekers' medical records being used against them, says mental health chief – video', *Guardian Australia*, 5 August 2014 <https://www.theguardian.com/world/video/2014/aug/04/asylum-seeker-health-records-used-against-them-video?CMP=gu_com>.

21 Discussion Paper, 114.

Recommendation 13: Insert a provision in the Privacy Act providing for consent to lapse

PIAC recommends that when obtaining consent, APP entities should specify how long the consent will be valid for. PIAC recommends amending the Privacy Act to provide for circumstances where consent is not withdrawn and it is not clear how long consent is given for, the consent should lapse after a defined period. The period after which consent lapses ought to be by reference to what would be within the reasonable expectations of the person giving consent, in consideration of the particular circumstances.

8. Direct right of action (proposal 25.1)

PIAC strongly supports the implementation of a direct right of action to litigate a claim for breach of privacy under the *Privacy Act*. We previously highlighted the issues with the current process in our Issues Paper Submission.[22]

We consider below whether each element of the proposed model is fit for purpose.

8.1 Who could exercise the right?

PIAC supports the proposal that the direct right of action would be available to any individual or group of individuals whose privacy has been interfered with by an APP entity. Allowing individuals to access the courts directly, means individuals would have greater control over their personal information, and would be better empowered to exercise their rights. Further, the right should be extended to allow representative classes of individuals to make representative complaints (class actions).

In PIAC's submission to the Parliamentary Joint Committee on Corporations and Financial Services Inquiry into litigation funding and the regulation of the class action industry, we observed that '[c]urrent class action regimes in most Australian jurisdictions, and the litigation funding arrangements that support those class actions, can provide access to justice for individual class members'.[23] We therefore submitted that '[a]ny proposals for reform of regulation of litigation funding or class action regimes should take account of these benefits to prospective plaintiffs and to the importance of litigation funding to public interest litigation'.[24]

PIAC observes that any debate about reforms to litigation funding and the regulation of the class action industry should be held in the Government's broader examination of the issue.[25] However, any proposed reform to the regulation of litigation funding or class action regimes should not be relevant to whether class actions should be available in the context of a direct right of action for a breach of privacy under the *Privacy Act*. Class actions are available for other breaches of statutory obligations, such as under the Australian Consumer Law. Equally, if a direct right of action is introduced into the *Privacy Act*, class actions should be available. Further, it is appropriate to have a class action where a breach of privacy affects a large number of people, who on their own may not be empowered and/or where it may not be economically viable to make an individual application, but may be able to access justice through a class action.

---

22 PIAC, Issues Paper Submission (November 2020), 8-9.

23 PIAC, Submission to Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry into Litigation Funding and the Regulation of the Class Action Industry* (11 June 2020) 1.

24 Ibid.

25 See for example, Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021 (Cth).

Recommendation 14: A direct right of action should be available to any individual or group of individuals as proposed

PIAC supports the proposal for a direct right of action to be available to any individual or group of individuals whose privacy has been interfered with by an APP entity.

8.2 Forum for the direct right of action

PIAC supports the ACCC's recommendation in the DPI Report[26] that the appropriate forum for this right be the Federal Court of Australia (**FCA**) or the Federal Circuit and Family Court of Australia (**FCFCOA**). This would provide a greater opportunity for both courts to interpret the *Privacy Act*, better enabling the public and APP entities holding personal information to understand their rights and obligations, as well as better enabling the OAIC to provide oversight of the legislation.

PIAC also supports the proposal that a 'small claims procedure' be created as an option for the hearing of certain privacy matters in the FCFCOA, and modelled on existing 'small claims' regimes. This approach should be less formal, timelier and more cost-effective, and would improve access to justice for individuals. We also consider this approach would effectively balance the rights of individuals to exercise greater control over their personal information against court resources being overburdened. Rules should be developed to establish the threshold for privacy matters which may be heard under the 'small claims procedure'.

Recommendation 15: The forum for a direct right of action be the FCA or the FCFCOA as proposed

PIAC supports the proposal that the appropriate forum for a direct right of action be the FCA or the FCFCOA.

Recommendation 16: A 'small claims procedure' be created for privacy matters in the FCFCOA

PIAC supports the proposal that a 'small claims procedure' be created as an option for the hearing of certain privacy matters in the FCFCOA, and modelled on existing 'small claims' regimes. Rules should be developed to establish the threshold for privacy matters which may be heard under the 'small claims procedure'.

8.3 Gateway to enliven the right

PIAC does not support the proposal that an applicant would first need to make a complaint to the OAIC (or other complaint handling body) and have their complaint assessed for suitability for conciliation either by the OAIC or a recognised external dispute resolution scheme. First, such a condition would create additional complexities, when one of the reasons for creating a direct right of action is to simplify the way individuals can protect their privacy.

Second, there is no identifiable benefit to the 'gateway' of making a complaint. The proposal envisages that once a complaint has been assessed, there would be four scenarios in which an individual could elect to initiate action in court.[27] One of these scenarios would be 'instead of pursuing conciliation'. If, under this proposal, conciliation is envisaged to be optional, there is no

[26] DPI Report, above n 11, 473.
[27] Discussion Paper, 188.

identifiable benefit to this triaging process. The proposed threshold requirement to make a complaint so that the complaint can be assessed for its suitability to conciliation, is a needlessly complex process for individuals, and a waste of the taxpayer resources, especially for applicants whose matters are complex or who are, at the outset, disinclined to pursue the conciliation process. Further, timeliness is likely to be relatively important in privacy matters, and this proposal would cause unnecessary delay.

Any direct right of action must be clear and simple – for the public to understand, for individuals to exercise, for entities to respond, and for courts to determine jurisdiction.

PIAC endorses an approach modelled on the Consumer Data Right (**CDR**) where applicants would have a choice as to whether they apply directly to the courts, or to seek conciliation through the OAIC. The OAIC's conciliation process should continue on an optional basis. It may be desirable for the OAIC to promote and encourage use of its conciliation mechanisms to resolve complaints.

Where the OAIC conciliation process is optional, based on PIAC's experience in working with complainants from marginalised communities, individuals with less serious or complex complaints are likely to prefer a process which is cost-free, less formal and which may provide a quicker resolution. Individuals with serious or more complex complaints, for whom conciliation has failed or for those who do not wish to go through the conciliation process, should be able to apply to the courts directly. This approach is the same as for the CDR.[28]

PIAC does not support the proposed requirement that individuals would need to seek leave of the court to make an application for a claim of a privacy breach. First, one of the reasons for creating a direct right of action is to simplify the way individuals can protect their privacy. The process of seeking leave adds additional complexity. If the courts are required to determine whether a claim meets a threshold requirement (prior to considering the substance of the application), this adds an extra process with attendant time, costs and resources burden. Second, such a threshold would limit the opportunity for courts to interpret the *Privacy Act*. Third, the granting of leave is antithetical to this form of redress being intended to be a 'right' of individuals as it would curtail the rights of individuals.

PIAC does not agree that the absence of a mandatory conciliation component or leave component would result in the court's resources being 'overburdened by frivolous claims'.[29] Court processes are expensive, highly technical and inherently risky. In PIAC's experience working with marginalised communities, the risk of applicants pursuing frivolous claims is extremely low, and outweighed by the barriers to justice that would be created by requiring conciliation and leave processes. Further, PIAC considers the risk of adverse cost orders which results from filing a claim in the FCA would deter against the filing of vexatious or unmeritorious claims.

The approach where individuals have a choice as to whether they seek conciliation through the OAIC, or apply directly and unconditionally to the courts, is simple and clear. This approach allows applicants and respondents to understand the forum in which a complaint is to be conducted, and the process and rules that apply. Once individuals exercise the choice, the

---

28 *Competition and Consumer Act 2010* (Cth), s 56EY.

29 Discussion Paper, 188.

complaints process is streamlined – either it proceeds through the well-worn path of conciliation at the OAIC, or it proceeds as a normal court proceeding.

For the reasons submitted above, in response to the question raised in the Discussion Paper,[30] we do not consider that the proposed gateway to the direct right of action strikes the right balance between protecting the court's resources and providing individuals a direct avenue for seeking judicial consideration and compensation.

Conversely, the option to apply directly and unconditionally to the courts effectively balances the rights of individuals to exercise greater control over their personal information, with the need to ensure court resources are used appropriately. This option has the following in-built mechanisms to balance against court resources being overburdened:

- a conciliation process remains available, and its use is encouraged by the OAIC to settle complaints;
- the OAIC could assist the court as amicus curiae;
- the Information Commissioner is able to seek leave to intervene in matters to assist with the streamlining of the resolution of complaints (see further below);
- the FCA and FCFCOA are both costs jurisdictions; and
- the courts' general powers to manage its resources remain unaffected, including court-ordered mediation and alternative dispute resolution processes, as well as processes in relation to abuse of process, frivolous or vexatious litigants.

Recommendation 17: Applicants should not be required to first make a complaint as a 'gateway' to the direct right of action

PIAC does not support the proposal that an applicant would first need to make a complaint to the OAIC (or other complaint handling body) and have their complaint assessed for suitability for conciliation either by the OAIC or a recognised external dispute resolution scheme.

Recommendation 18: Applicants should not be required to seek leave to make an application for a breach of privacy claim

PIAC does not support the proposal that an applicant would need to seek leave of the court to make an application for a claim of a privacy breach.

Recommendation 19: Applicants should be able to elect between seeking conciliation through the OAIC, or applying directly and unconditionally to the courts

PIAC recommends that applicants should be able to elect between seeking conciliation through the OAIC, or applying directly and unconditionally to the courts.

8.4 Harm threshold: what the applicant would need to establish

PIAC does not support a 'harm threshold' as it would limit the availability of the right to only 'serious interferences' of the *Privacy Act*. We reiterate the position as stated in our Issues Paper Submission. It is not clear how 'serious interferences' would be defined, and who would determine whether the threshold was met. If the courts are required to determine whether a breach is sufficiently 'serious' to determine whether it has jurisdiction (prior to considering the substance of the application), this adds an extra process and risks being a burden on time, costs

[30] Discussion Paper, 190.

and resources. If the Commissioner is required to make this determination prior to a complainant filing a court application, this creates even greater time, costs and resources burden. This is especially so if the court then has jurisdiction to consider the Commissioner's determination of the 'seriousness' of the breach.

We also note that the courts' jurisdiction in respect of breaches of human rights instruments, including the various discrimination legislation, are not limited to 'serious interferences'. The *Privacy Act*, being a piece of legislation that seeks to protect the privacy of individuals in line with international human rights law, should not create arbitrary barriers to individuals seeking access to justice, especially given this is not consistent with how the courts currently operate in similar matters.

Recommendation 20: A direct right of action should not be limited by a 'harm threshold'

PIAC does not support introducing a 'harm threshold' and to limit the direct right of action only to 'serious interferences' of the Privacy Act.

8.5 Role of the OAIC as amicus curiae

PIAC agrees with the proposal to allow the OAIC to be heard in proceedings as amicus curiae to assist the court, including to draw attention to an issue and to interpret legislation it administers. It is not clear why the proposed model for the OAIC appearing as amicus curiae would extend to 'provid[ing] expert evidence'[31] as ordinarily this is not the role of an amicus curiae.

As to an intervention function in applications involving privacy rights and obligations, PIAC does not agree that such function would be more appropriately held by the Commonwealth Attorney-General. It is not clear why the Discussion Paper expresses the view that it would be more appropriate for the Commonwealth Attorney-General to be granted the power to intervene.

We maintain our recommendation in the Issues Paper Submission that the Information Commissioner ought to be given the intervener function. Such an intervener function would be similar to functions conferred on other administrative bodies, such as the ACCC, Australian Securities and Investments Commission and the Australian Human Rights Commission. Further, the Information Commissioner, being a statutory appointment, would have more independence to intervene than the Commonwealth Attorney-General, and therefore more likely to exercise an intervening power (for example where the respondent is the Commonwealth). For these reasons, it would be more appropriate for the Information Commissioner to be given the intervener function.

As submitted in our Issues Paper Submission, exercise of the amicus curiae and intervention functions must be subject to leave being granted by the court, and subject to any conditions imposed by the court. This ensures that the court is able to determine whether the Information Commissioner's involvement will assist the court in resolving disputes, or whether it will increase delay in the proceeding. It will also ensure the court properly considers any interest the Information Commissioner has as an intervenor in the proceedings.

31 Discussion Paper, 189.

Recommendation 21: The OAIC should have the ability to appear as amicus curiae

PIAC agrees with the proposal that the OAIC would have the ability, subject to leave being granted by the court, to appear as amicus curiae to assist the court, but not to provide expert evidence.

Recommendation 22: The Information Commissioner ought to be granted the power to intervene, not the Commonwealth Attorney-General

PIAC does not support the proposal for the Commonwealth Attorney-General to be granted the power to intervene. Instead, the Information Commissioner ought to be given the intervener function, subject to leave being granted by the court and any conditions imposed by the court.

8.6 Remedies

PIAC supports the proposal that the available remedies under this right would be any order the court sees fit, including any amount of damages. As submitted in our Issues Paper Submission, we do not support the imposition of a cap on damages and welcome the Discussion Paper's similar views on this issue.

Recommendation 23: A range of remedies should be available, including any amount of damages

PIAC supports the proposal that available remedies would be any order the court sees fit, including any amount of damages.

9. Statutory tort of privacy (proposals 26.1 to 26.4)

PIAC strongly supports the introduction of a statutory tort for serious invasions of privacy. As we stated in our Issues Paper Submission, by relying on various federal and state legislation, equity and some criminal offences, there remain significant gaps in the legal framework for the protection of privacy.[32]

By way of summary, PIAC supports option 1, subject to the specific matters raised below. Although option 2 is not preferred, we consider that it could be the bare minimum as an alternative but not a substitute to option 1. PIAC does not support options 3 or 4.

9.1 Option 1: A statutory tort

PIAC maintains its submission that it is necessary that a tortious cause of action is developed by the legislature. A statutory cause of action would accord with public expectation that victims of invasion of privacy are not left without recourse to a legal remedy.

PIAC submits that option 1 in the Discussion Paper should be adopted. We largely agree with the Australian Law Reform Commission's (**ALRC**) recommendations for a statutory tort model,[33] except for the matters addressed below.

[32] PIAC, Issues Paper Submission (November 2020), 13-14.
[33] ALRC, *Serious Invasions of Privacy in the Digital Era*, Final Report (Report 123, June 2014) (**ALRC Report**).

PIAC considers that adopting option 1 should not prevent the common law expanding on the statutory cause of action. The statutory model should retain sufficient flexibility to allow future development of the cause of action.

Recommendation 24: Introduce a statutory tort for invasion of privacy

PIAC supports option 1 to introduce a statutory tort for invasion of privacy based on the ALRC's model with PIAC's additional recommendations.

9.1.1 Examples of types of invasions of privacy

PIAC supports the ALRC's proposal that there be two types of invasions of privacy.[34] The ALRC recommends that brief and general examples of certain types of invasions of privacy be included in the *Privacy Act*.[35] As an alternative, PIAC submits that any new legislation introducing the tort should contain a non-exhaustive list of examples of conduct that may be an invasion of privacy. This would provide the public with guidance, certainty and clarity by giving context to the cause of action and the circumstances in which it might arise. PIAC submits there needs to be sufficient flexibility in the new standalone statute for it to be appropriately adapted to changing social and technological circumstances.

PIAC also recommends that 'intrusion upon seclusion' extend to physical privacy intrusions such as unreasonable search and seizure, or media harassment. These physical privacy intrusions may not necessarily result in disclosure of private information but may nonetheless amount to arbitrary or unlawful interference with privacy.

Recommendation 25: Introduce a legislated non-exhaustive list of examples of invasions of privacy

PIAC recommends that there should be a legislated non-exhaustive list of examples of conduct that may be an invasion of privacy.

Recommendation 26: 'Intrusion upon seclusion' should extend to physical privacy intrusions such as unreasonable search and seizure or media harassment

PIAC recommends that 'intrusion upon seclusion' should extend to physical privacy intrusions such as unreasonable search and seizure, or media harassment.

9.1.2 Reasonable expectation of privacy

PIAC supports the recommendation of the ALRC that a non-exhaustive list of matters be included to assist the court to determine whether the applicant would have had a reasonable expectation of privacy in all of the circumstances.[36] In addition to the ALRC's list, PIAC also recommends that the extent to which the plaintiff is in a position of vulnerability ought to be a factor in considering whether there was a reasonable expectation of privacy. Relevantly, the ALRC 'agrees that vulnerability may not only make an invasion of privacy more offensive and harmful, but will also sometimes suggest information is private, or that a person should not be intruded upon'.[37]

---

34 Ibid, 73.
35 Ibid, Recommendation 5-1.
36 Ibid, Recommendation 6-2.
37 Ibid, [6.69].

Recommendation 27: The extent to which the plaintiff is in a position of vulnerability should be relevant to whether there is a reasonable expectation of privacy

PIAC recommends that the non-exhaustive list of matters to determine whether there is a reasonable expectation of privacy should include the extent to which the plaintiff is in a position of vulnerability.

9.1.3 Seriousness

PIAC agrees that the cause of action should only be available when the court considers that the invasion of privacy was 'serious'. However, we do not agree with the ALRC's recommendation that 'seriousness' should be a separate standalone element of the action, which the plaintiff should be required to satisfy.[38] Instead, we submit that 'seriousness' should be a relevant consideration regarding the nature of the conduct, rather than a separate element of the threshold test.

PIAC considers that any consideration as to the seriousness of the cause of action should be by reference to an objective standard.

Recommendation 28: 'Seriousness' should not be a standalone element of the action

PIAC does not support the ALRC's recommendation that 'seriousness' should be a separate standalone element of the action to be established by the plaintiff. Instead, PIAC recommends that 'seriousness' should be considered as part of the nature of the conduct. Consideration as to the seriousness of the cause of action should be by reference to an objective standard.

9.1.4 Fault: intentional, reckless or negligent invasions of privacy

In contrast to the ALRC's recommendation,[39] PIAC considers that the tort should not be confined to intentional or reckless invasions of privacy but should extend to negligent invasions of privacy. It is important that the tort extends to those negligent acts where the impact of the breach of privacy can be just as serious for the applicant as that of a deliberate or reckless breach.

For example, an organisation with inadequate security procedures may negligently release personal information about its clients. It would be undesirable if victims of these privacy breaches did not have legal recourse. In our Issues Paper Submission, we referred to a number of public and private sector data breaches. As we stated, in many of those data breaches, it is unlikely that the privacy breach would reach the thresholds of 'intentional' or 'reckless'. That should not prevent legal recourse for individuals who are victims of invasions of their privacy arising from negligence.

We note that the *Civil Remedies for Serious Invasions of Privacy Bill 2020* (NSW) proposes a differentiated fault element, whereby negligence is only included as a fault element for government entities or corporations, with individuals only liable for intentional or reckless conduct.[40] PIAC considers this is an innovative solution warranting further consideration.

38 Ibid, Recommendation 8-1.
39 Ibid, Recommendation 7-1.
40 Clause 11.

Recommendation 29: The tort should extend to intentional, reckless or negligent invasions of privacy

PIAC does not support the ALRC's recommendation that the tort should be confined to intentional or reckless invasions of privacy. PIAC recommends that the tort should extend to negligent invasions of privacy. Alternatively, PIAC recommends that the tort extend to negligent invasions of privacy committed by government entities or corporations with individuals only liable for intentional or reckless conduct.

9.1.5 Defences

To balance competing public interests against an individual's right to privacy, PIAC submits that the following defences should be included in the new standalone statute:

- the respondent's conduct was authorised or required by law;
- the respondent'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;
- consent, including implied consent, but only where that consent is specific to the conduct alleged to have breached the person's privacy; and
- 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. This may include – as proposed by the ALRC – freedom of expression, the implied freedom of political communication, freedom of the media to investigate and report on matters of public concern, the proper administration of government, open justice, public health and safety and national security.

Regarding the above proposed public interest defence, it should be noted that the various law reform bodies have taken different views in their privacy inquiries. PIAC agrees with the approach taken by the Victorian Law Reform Commission (**VLRC**), namely that it is more appropriate for competing public interests to be one of several defences to the proposed cause of action. PIAC also 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 is interested in'.[41] We support the inclusion in the *Privacy Act* of a non-exhaustive list of public interest matters that a court may consider.

The VLRC's view is converse to the view of the ALRC, which espouses that a cause of action should require that the public interest in privacy outweigh any countervailing public interest.[42] PIAC considers there are two problems with the ALRC's approach of incorporating a balancing test into the cause of action itself. First, it places an unreasonably onerous evidentiary burden on applicants and is likely to discourage the bringing of claims under the statute. Second, respondents should carry the burden of proof in relation to any countervailing public interests, which would best be done in the context of a raising a defence.

PIAC does not agree with the ALRC's proposal that 'necessity' should be a defence.[43] If a 'public interest' defence was introduced, it would cover circumstances such as responding to an imminent danger or emergency.

---

41 VLRC, *Surveillance in Public Places* (Final Report 18, 2010) (**VLRC Report**), Recommendation 27(f).
42 ALRC Report, above n 33, Recommendation 9-1.
43 Ibid, Recommendation 11-3.

In relation to the publication of public documents,[44] as to whether that defence applies, consideration should be given to the specific facts and circumstances of the publication, and the fact that information may still be private and personal to the plaintiff, even though it has been published or is contained in a public record. In some cases, information could be in the public domain erroneously or unlawfully. In such cases, the plaintiff should not be denied a remedy.

PIAC also cautions against the inclusion of wide categories of activities, organisations or types of activities or organisations that are automatically exempt from the operation of the proposed cause of action. If the cause of action is framed appropriately, there would be no need for general exemptions.

Recommendation 30: Specific countervailing public interests should be raised as a defence rather than an element of the cause of action

PIAC does not support the ALRC's recommendation that a plaintiff would need to establish that the public interest in privacy outweighs any countervailing public interest. Instead, PIAC recommends that it would be more appropriate for competing public interests to be a defence to the cause of action. PIAC also recommends that the legislation specify that the 'public interest is a limited concept and not any matter the public is interested in' and supports the inclusion of a legislated non-exhaustive list of public interest matters.

Recommendation 31: If a 'public interest' defence were to be introduced, there would be no place for a defence of 'necessity'

If a 'public interest' defence were to be introduced, PIAC considers that there would be no place for also including a defence of 'necessity'.

Recommendation 32: Exemptions from the cause of action should be limited

PIAC recommends against the inclusion of wide categories of activities, organisations or types of activities or organisations that are automatically exempt from the operation of the cause of action.

9.1.6 Damages and remedies

PIAC agrees with the approach taken by the ALRC that a range of remedies should be made available to the court to order where a person has been aggrieved by an invasion of their privacy.[45]

In relation to the amount of damages for non-economic loss and any exemplary damages that can be awarded for serious invasions of privacy, PIAC does not support the ALRC's recommendation to impose a cap.[46] PIAC recommends that damages should be unlimited because if the ceiling is set too low, it will be inadequate to redress unlawful conduct, and will fail to have a deterrent effect. Further, any increase to the ceiling would require statutory amendment, which can be a timely and costly process.

However, if damages are to be limited, PIAC supports them being set in accordance with defamation legislation given that this protects an analogous right.

---

44 Ibid, Recommendation 11-6.
45 Ibid, [12.1].
46 Ibid, [12.6].

Recommendation 33: There should be no cap imposed for damages for non-economic loss and exemplary damages

PIAC does not support the ALRC's recommendation to impose a cap for damages for non-economic loss and any exemplary damages. If damages are to be limited, PIAC supports them being set in accordance with defamation legislation.

9.2 Option 2: Minimalist statutory tort

PIAC considers that option 2 could be the bare minimum as an alternative but not a substitute to option 1. A minimalist statutory tort may activate courts to interpret the legislation and develop common law as to the elements and scope of the tort. However, PIAC relies on its Issues Paper Submission for the advantages a statutory cause of action would have over common law development. In particular, it provides individuals and businesses with greater certainty and uniformity by clarifying rights and obligations. Further, the risk of adverse costs orders would be too significant to allow for common law development, especially against a background where the courts have not, over a long period of time, embraced the opportunity to develop this tort.

Recommendation 34: A minimalist statutory tort should only be introduced if option 1 is not adopted

PIAC would only recommend option 2 (minimalist statutory tort) if option 1 (ALRC's statutory tort model with PIAC's additional recommendations) is not adopted, noting that we do not consider option 2 to be a substitute to option 1.

9.3 Option 3: Extending the *Privacy Act* to individuals

PIAC does not support option 3 as the protections in the *Privacy Act* are limited to the protection of personal information. That is, the *Privacy Act* fails to protect against invasions of privacy that involve interference with one's person or territory. The Discussion Paper recognises this limitation.[47] Specifically, the ALRC's proposed tort in relation to intrusion upon seclusion is not dealt with by the *Privacy Act*. The ALRC's proposed tort in relation to misuse of private information is also not covered by the current *Privacy Act* in a vast range of circumstances, including where that misuse is by a small business operator, a media organisation, or registered political parties, or the misuse is in relation to employee records.

Given that the *Privacy Act* covers only a small part of the ALRC's proposed tort, these limitations mean that individuals have limited recourse for invasions to their privacy. Therefore, even if the *Privacy Act* were to extend to individuals and a direct right of action is enacted, it would not provide a sufficient remedy for invasions of privacy that lie outside the parameters of the legislation.

PIAC also does not support that the tort of privacy should be left to the incremental development of common law through the courts. As we stated in our Issues Paper Submission, there has been a reluctance by superior courts in Australia to develop a tort of privacy. The common law development of such a tort is likely to take a long time, if it ever happens.

47 Discussion Paper, 196.

Recommendation 35: Extending the Privacy Act to individuals would not be an adequate alternative to introducing a statutory tort

PIAC does not support option 3 (extending the Privacy Act to individuals) as an alternative to introducing a statutory tort.

9.4 Option 4: Making damages for emotional distress available for actions for breach of confidence

PIAC does not support option 4 as it is not an adequate alternative to a statutory tort of privacy. First, this cause of action is limited to breaches relating to information and does not cover intrusions upon seclusion (where such intrusion is not accompanied by misuse of personal information). Second, this option contemplates each state and territory 'considering' whether to legislate. Therefore, it is a matter of discretion whether states and territories take action. Third, even if individual jurisdictions legislated to make available damages for emotional distress, this could result in a more piecemeal framework.

Recommendation 36: Making damages for emotional distress available for actions for breach of confidence would not be an adequate alternative to introducing a statutory tort

PIAC does not support option 4 (making damages for emotional distress available for actions for breach of confidence) as an alternative to introducing a statutory tort.

10. Interactions with other schemes (proposal 28.1)

Against the background of the CDR for Energy, PIAC is concerned about the interaction and potential conflict between the CDR privacy safeguards and the protections in the *Privacy Act*. Although the CDR privacy safeguards were initially intended to be more restrictive than the protections in the *Privacy Act*, since responsibility of the CDR shifted from the ACCC to Treasury, PIAC considers that there have been significant changes focused on the opportunity of the data industry at the cost of consumer protection. For example, in the context of the sharing of joint data, one partner can opt to share the data of both people. That is, both people are not required to consent, and in this regard the CDR adopts an opt-out rather than opt-in approach. Further, with the evolving nature of the CDR scheme, namely the progressive adding of sectors, consumer and privacy protection has been eroded.

PIAC supports the proposal that OAIC guidance could set out information on how the *Privacy Act* interacts with other schemes in greater detail.

In the particular context of CDR for Energy, as this is an existing scheme, PIAC does not recommend development of a 'non-binding privacy law design guide' (proposal 28.1). Instead, to the extent practicable, PIAC recommends the protections in the *Privacy Act* should be the minimum afforded in other Commonwealth schemes, including CDR.

Recommendation 37: The protections in the Privacy Act should be the minimum afforded in other Commonwealth schemes

As CDR for Energy is an existing scheme, rather than developing a non-binding privacy law design guide, PIAC recommends that the protections in the Privacy Act should be the minimum afforded in other Commonwealth schemes.

11. Conclusion

PIAC welcomes the review of the *Privacy Act* and the opportunity to comment on proposed reforms. The review provides an opportunity to update the *Privacy Act* to ensure it meets community expectations about the use of individuals' personal information and their right to privacy and provides a chance for Australian law to catch up with our common law counterparts. PIAC looks forward to reviewing the Final Report of the review of the *Privacy Act*.