Public Interest Advocacy Centre

Privacy Act Review Report consultatation response

31 March 2023

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About the Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is 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.

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 Public Interest Advocacy Centre

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

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1. Support for reform

The Public Interest Advocacy Centre (**PIAC**) welcomes the opportunity to respond to the Privacy Act Review Report (**Review Report**) prepared by the Attorney-General's Department following a lengthy review process examining the *Privacy Act 1988* (Cth) (**Privacy Act**).

PIAC provided submissions in response to the Issues Paper and Discussion Paper as part of that review process.[1] This submission focuses on the proposals for reform addressed in our previous submissions, referred to here as Issues Paper Submission and Discussion Paper Submission.

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 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 repeatedly recommended that a statutory cause of action to protect the right to privacy be enacted.

PIAC continues to believe that national privacy laws require reform in areas of longstanding concern raised in our previous submissions, in the context of the digital economy, new technologies and the increasing use of personal information by a range of public and private actors. Since the review process commenced, new Commonwealth schemes like the Consumer Data Right (CDR) have developed, increasing the complexity of privacy regulation. We have also seen several high profile, extensive and serious data breaches involving exposure of personal information of millions of Australians. It is time to act to strengthen privacy protections for personal information through the Privacy Act, as well as to provide people with adequate remedies when their privacy is seriously breached.

Our submission is limited to the following proposals for reform discussion in the Review Report, where PIAC has direct experience and has made previous submissions to the review process:

- Objects of the Act (proposal 3.2);
- Definition of personal information (proposals 4.1 to 4.3);
- Consent (proposals 11.1 to 11.3);
- Fair and reasonable test for collection, use and disclosure (proposals 12.1 and 12.2)
- Direct right of action (proposal 26.1); and
- Statutory tort of privacy (proposal 27.1).

PIAC welcomes the Review Report and its proposals for broad and meaningful change to the Privacy Act. PIAC urges the government to take this opportunity to implement reforms expeditiously and comprehensively, so that Australians can have the benefit of these necessary protections.

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[1] PIAC, Submission to Discussion Paper on the Review of the Privacy Act 1988 (December 2021) https://piac.asn.au/wp-content/uploads/2021/12/PIAC-Submission-to-Discussion-Paper-on-the-Review-of-the-Privacy-Act-1988.pdf ; PIAC, Submission to the Review of the Privacy Act 1988 (November 2020) https://piac.asn.au/wp-content/uploads/2021/01/Submission-re-Review-of-the-Privacy-Act-1988.pdf

In particular, PIAC supports the proposals to introduce a direct right of action for people who are harmed by breaches of the Privacy Act. PIAC also supports the creation of a statutory tort of privacy. We comment further on those proposals in this submission.

PIAC's support for the proposals endorsed in the Review Report can be summarised as follows:

Review Report Proposal	PIAC Position	Recommendation
3.2 Amend the objects of the Act to recognise the public interest in protecting privacy	Support with amendment	Implement proposal 3.2, and amend subsection 2A(b) to refer to activities undertaken in the public interest
4.1-4.3 Amend definition of 'personal information' and 'collect'	Support	Implement as proposed
11.1 Introduce definition of 'consent'	Support with amendment	Revert to wording proposed in Discussion Paper – consent to be 'voluntary, informed, current, specific, and unambiguous indication through clear action'
11.2 OAIC could develop guidance on how online services should design consent requests	Support but recommend expanding	Standardised consents for all APP entities should be developed through guidance in codes
11.3 Recognise ability to withdraw consent	Support	Implement as proposed
26.1 Introduce direct right of action	Support with amendment	Implement subject to amending requirement to make a complaint as a 'gateway'
27.1 Introduce statutory tort of invasion of privacy	Support with amendment	Implement subject to modifications outlined in this submission
29.1 Privacy law design guide	Amend	Ensure Privacy Act protections are minimum afforded in other schemes

2. Objects of the Privacy Act

PIAC supports the proposal to recognise the public interest in protecting privacy in the objectives. However, proposal 3.2 does not fully address the concerns with the existing objectives, which position the privacy interests covered by the Act as in competition with commercial interests.

PIAC considers that it remains necessary to amend objective 2A(b) as was proposed in the Discussion Paper. PIAC suggests that referring to the public interest, carefully defined, could achieve this. We therefore repeat our recommendation from our Discussion Paper Submission

that subsection 2A(b) be amended to clarify that the protection of privacy should only be balanced against those interests of entities which are 'undertaken in the public interest'.[2]

The 'public interest' in this context 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.

In addition, we suggest the objects of the Act also be amended to add the objective of providing 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.

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

PIAC recommends adopting the proposal made in the Discussion Paper 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.

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

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.

3. Personal information

As outlined in PIAC's Submission to the Discussion Paper, PIAC supports proposals 4.1 and 4.2 to change the definition of personal information to make it clearer that technical and inferred information can be personal information.[3] We agree that this can be achieved by changing the word 'about' to 'relates to', and by including a non-exhaustive list in the Act of information that may be personal information.

For the reasons given in our Submission to the Discussion Paper, PIAC also supports proposal 4.3 to amend the definition of 'collect' to expressly cover information obtained from any source and by any means, including inferred or generated information.

Recommendation 3: Amend the definitions of 'personal information' and 'collect' as proposed

The definition of 'personal information' should be amended by changing the word 'about' to 'relates to' and by including a non-exhaustive list of information that may be personal information. The definition of 'collect' should be amended to expressly cover information obtained from any source and by any means, including inferred or generated information.

2 PIAC Discussion Paper Submission, 7-8.
3 PIAC Discussion Paper Submission, 8-9.

4. Consent

4.1 Definition of 'consent'

As outlined in our Submission to the Discussion Paper, PIAC supports amending the definition of 'consent' to specify that is 'voluntary, informed, current, specific and an unambiguous indication through clear action'.[4]

The Review Report proposes removing the final element of 'indication through clear action', suggesting this would avoid any question that the definition precludes the use of implied consent in some circumstances, for example in clinical healthcare settings. However, the Review Report also notes that the OAIC considers the previously proposed phrasing would still allow for implied consent in appropriate circumstances. APP 6.2 provides for the use of personal information without consent specifically in 'permitted health situations', and for secondary purposes related to the primary purpose, such that this concern does not seem well supported.

We consider that the phrasing 'voluntary, informed, current, specific and an unambiguous indication through clear action' is preferable to the version proposed in the Review Report, as it is clearer about the need for affirmative action to indicate consent. We do not agree the phrase should be shortened as proposed.

We also repeat our recommendation that some definition be provided in the Act of each of these elements of consent (and not just in the explanatory materials and/or OAIC guidance), with further guidance provided in APP guidelines.[5]

Recommendation 4: Define 'consent' in the Privacy Act as proposed in the Discussion Paper

'Consent' should be defined in the Privacy Act as being voluntary, informed, current, specific and an unambiguous indication through clear action.

Recommendation 5: Clearly define the elements of 'consent' in the Privacy Act and in the APP guidelines

Define the elements of 'consent' in the Privacy Act: 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.

4.2 Withdrawal of consent

In relation to the currency and withdrawal of consent, PIAC supports proposal 11.3 to expressly recognise the ability to withdraw consent.

PIAC also recommended in its Submission to the Discussion Paper that a provision be introduced to allow for consent to lapse after a period of time, if it is not clear how long it is intended to last for and has not already been actively withdrawn by a person.[6] This would acknowledge that consent must be current and specific. The Review Report notes, in relation to currency, that

4 PIAC Discussion Paper Submission, 9.
5 PIAC Discussion Paper Submission, 9-10.
6 PIAC Discussion Paper Submission, 13.

'OAIC guidance says that consent cannot be assumed to endure indefinitely, and it is good practice to inform individuals of the period that consent will be relied on in the absence of a material change of circumstances.'[7] Introducing a provision into the Act for consent to lapse would strengthen this expectation, giving effect to the right to privacy protection and giving people greater control over their personal information. We repeat that recommendation.

Recommendation 6: Recognise ability to withdraw consent and provide for consent to lapse after defined period

The ability to withdraw consent should be recognised expressly in the Privacy Act as proposed. Where consent is not withdrawn and it is not clear how long consent is given for, the Privacy Act should provide for consent to 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.

4.3 Standardised consents

Proposal 11.2 of the Review Report deals with standardised consents. PIAC supports the proposal to introduce standardised consents through APP codes, but repeats our comments from our response to the Discussion Paper regarding the benefits of standardised consents beyond just the online context.[8] PIAC suggests the proposal in the Review Report should be strengthened to commit to progressing standardised consents in APP codes for all APP entities. Recognising the wide range of contexts and sectors where the Privacy Act applies, standardisation could occur by reference to categories of consents and could be rolled out in phases, beginning with organisations subject to the Online Privacy Code and subsequently extended to capture all APP entities.

Recommendation 7: Introduce standardised consent requests for all APP entities

The proposal to introduce standardised consents should proceed beyond the online context, 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.

5. Fair and reasonable test

PIAC supports proposal 12.1 to introduce a requirement in the Act that the collection, use and disclosure of personal information must be fair and reasonable in the circumstances.

PIAC agrees with observations made in the Discussion Paper that the current framework places a large onus on individuals to self-manage their privacy.[9] PIAC agrees that a 'notice and consent regulatory model' is not sufficient to protect privacy in an age of digital transformation where the collection, use and disclosure of personal information is occurring so frequently and in so many contexts that consumers cannot be expected to meaningfully engage with every collection notice and request for consent. The burden of managing privacy risks should be shared through clear obligations on APP entities.

7 Review Report, 105.
8 PIAC Discussion Paper Submission, 10.
9 Discussion Paper, 81.

PIAC considers that an objective 'fair and reasonable' test as proposed would provide a baseline level of protection for people by providing objective constraints to the collection, use and disclosure of personal information.

PIAC also supports the inclusion of a list of factors to be taken into account in assessing whether a collection, use or disclosure is 'fair and reasonable' (proposal 12.2). However, we do not support the current proposal to list those factors as discretionary considerations – matters that 'may be taken into account' – in the overall consideration of fairness and reasonableness. In our view, each of the listed factors need to be considered, and the current proposal risks APP entities picking and choosing which of the factors they give weight to. APP entities are more likely to apply these factors inconsistently if they are suggestions only.

The factors are not expressed as threshold questions which each must be satisfied, such that a proper consideration could still weigh them in determining the overall fairness and reasonableness of the collection, however, they must at least each be considered. We therefore recommend that the legislated factors be expressed as mandatory considerations.

Further guidance on how to consider each factor could then be provided in OAIC guidance, as well as guidance on what would not be considered fair and reasonable. In particular, PIAC suggests Commissioner-issued guidelines be developed, setting out categories of acts and practices that would not satisfy the fair and reasonable test.

In addition, we recommend incorporating a consideration of vulnerability into the list of factors. Vulnerability is recognised as relevant to the fair and reasonable test later in the Review Report at page 159:

> 'While the "fair and reasonable test" would be assessed objectively, where an entity is aware that it is likely to be handling information of people experiencing vulnerability, or is engaging in activities which could have a significant effect on people experiencing certain vulnerabilities, those circumstances will be relevant to whether the entity's information handling objectively satisfies the fair and reasonable test.'

We recommend the addition of a factor or factors to the list requiring consideration of whether the information is likely to come from people experiencing particular vulnerabilities, which may impact on the sensitivity of the information or the risk of harm.

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

Introduce a 'fair and reasonable' test for the use, collection or disclosure of personal information as proposed.

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

Legislated factors should be introduced to assist in assessing whether a collection, use or disclosure of personal information is fair and reasonable. It should be mandatory to consider all of those factors in making the assessment. In addition to the factors proposed, an additional factor should be included requiring consideration of circumstances of vulnerability.

6. Direct right of action

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 Discussion Paper Submission and Issues Paper Submission.[10] Our Discussion Paper Submission outlined our position on the proposed model, which is summarised as:

- A direct right of action should be available to any individual or group of individuals whose privacy has been interfered with by an APP entity;
- The appropriate forum for a direct right of action is the Federal Court of Australia or the Federal Circuit and Family Court of Australia;
- PIAC supports the proposal to create a 'small claims procedure' as an option for the hearing of certain privacy matters in the FCFCOA, modelled on existing 'small claims' regimes.
- Applicants should not be required to first make a complaint to the OAIC (or other complaint handling body) as a 'gateway' to the direct right of action;
- Applicants should be able to elect between seeking conciliation through the OAIC, or applying directly and unconditionally to the courts;
- Applicants should not be required to seek leave to make an application for a breach of privacy claim;
- A direct right of action should not be limited by a 'harm threshold';
- The OAIC should have the ability to appear as amicus curiae;
- The Information Commissioner ought to be granted the power to intervene (and not the Commonwealth Attorney-General);
- A range of remedies should be available, including any amount of damages.

PIAC maintains that position, for the reasons given in our Discussion Paper Submission. We strongly support proposal 26.1 to introduce a direct right of action with the design elements outlined in the Review Report, except for the proposed 'gateway' requirement for a person to make a complaint to the OAIC before exercising the direct right of action.

As outlined in our Discussion Paper Submission, imposing this requirement adds unnecessary complexity and time delays to the potential action, particularly if the consideration by the OAIC is only for the purpose of determining that conciliation is not suitable or not desired. In addition, the justification given for the 'gateway' requirement, to avoid unnecessarily burdening court resources, does not seem well founded.

Instead, PIAC endorses an approach modelled on the Consumer Data Right (CDR) where applicants have a choice as to whether they apply directly to the courts, or seek conciliation through the OAIC. Based on PIAC's experience in working with complainants from marginalised communities, people with less serious or complex complaints are likely to prefer the conciliation process which is cost-free, less formal and which may provide a quicker resolution. People 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.

Similarly, PIAC does not support requiring a person to seek leave of the court to make an application for a claim of a privacy breach. Requiring leave adds additional complexity to the process, and creates an arguably greater burden for court resources. It also limits the opportunity

[10] PIAC Discussion Paper Submission, 14-19; PIAC Issues Paper Submission, 8-11.

for courts to interpret the Privacy Act, and diminishes the value of the 'right' of action for those who might need to rely on it.

We do not agree with concerns about court resources being overburdened by frivolous claims. 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.

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 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;
- 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.

PIAC therefore reiterates its recommendation that the direct right of action should not be limited by a 'gateway' requirement for a complaint to be made and considered by the OAIC and/or for leave to be granted by the court to pursue the claim.

Recommendation 10: Applicants should be able to elect between conciliation through OAIC or applying directly to the courts, and should not be required to first make a complaint as a 'gateway' to the direct right of action

Applicants should not be required to first make a complaint to the OAIC (or other complaint handling body) as a 'gateway' to the direct right of action.

Applicants should not be required to seek leave form the court to make an application for a breach of privacy claim.

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

7. Statutory tort

PIAC strongly supports the introduction of a new statutory tort for invasions of privacy. A statutory tort would end the legal uncertainty regarding the ability to take civil action for invasions of privacy and would address significant gaps in current privacy protection frameworks, for example, in relation to intrusions on privacy that do not relate to personal information.

The Review Report recommends a statutory tort be introduced in the form recommended in ALRC Report 123. In our Discussion Paper Submission, PIAC recommended the new tort take

the form recommended in ALRC Report 123, subject to several modifications.[11] We remain of the view that those modifications to the ALRC Report 123 proposal are necessary. They include:

- The legislation should list (non-exhaustively) examples of conduct that may be an invasion of privacy;
- The 'intrusion upon seclusion' form of invasion of privacy should clearly extend to physical privacy instrusions, such as unreasonable search and seizure, or media harassment;
- The proposed 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;
- 'Seriousness' should not be a separate standalone element of the action to be established by the plaintiff. Instead, 'seriousness' should be considered as part of the nature of the conduct.
- The tort should not be confined to intentional or reckless invasions of privacy, but should extend to negligent invasions of privacy, at least in respect of actions against government entities or corporations. As set out in our Discussion Paper Submission, negligent acts may be just as serious for an applicant as deliberate or reckless breaches, and those applicants should also have some recourse. The example we gave of big data breaches continues to be relevant, as more of those breaches come to light – such breaches are unlikely to be 'intentional' or 'reckless' but may nonetheless result in significant harm to people. The Review Report raised the need for damage to be an element of any negligence claim, and this being inconsistent with the proposal for proof of damage not to be required for the tort. This could be overcome with appropriate framing of the legislative action in respect of negligent acts, which may require an additional element of damage to intentional or reckless acts.
- The tort should not require a plaintiff to establish that the public interest in privacy outweighs any countervailing public interest. This places an undue evidentiary burden on applicants where respondents are the more appropriate party to be addressing questions of countervailing public interest. Instead, there should be a defence of public interest. If a 'public interest' defence were to be introduced, that there would be no place for also including a defence of 'necessity'.
- Whichever way the tort is framed in relation to public interest, the legislation should make clear that public interest is a limited concept and not any matter the public is interested in. It should include a non-exhaustive list of public interest matters.
- There should not be a cap for damages for non-economic loss and exemplary damages. If damages are to be limited, PIAC supports them being set in accordance with defamation legislation.

Recommendation 11: Adopt a statutory tort of invasion of privacy in a form as recommended in ALRC Report 123 with modifications

PIAC recommends that the form of statutory tort introduced should be modelled on that recommended by the ARLC in Report 123, subject to the following modifications:

- *Include a legislated non-exhaustive list of examples of conduct that may be an invasion of privacy;*
- *Ensure 'intrusion upon seclusion' extends to physical privacy intrusions such as unreasonable search and seizure or media harassment;*

11 PIAC Discussion Paper Submission, 19-24.

- *Add the extent to which the plaintiff is in a position of vulnerability to the list of factors that are relevant to whether there is a reasonable expectation of privacy;*
- *Provide for 'seriousness' to be considered as part of the nature of the conduct rather than a separate standalone element of the action to be established by the plaintiff;*
- *Extend the proposed tort to negligent invasions of privacy, at least in respect of government and corporate defendants;*
- *Include a defence of public interest, rather than requiring a plaintiff to establish that the public interest in privacy outweighs any countervailing public interest. Specify that the public interest is a limited concept and not any matter the public is interested in, with reference to a legislated non-exhaustive list of public interest matters;*
- *If a public interest defence is included, exclude the proposed defence of necessity.*

8. Interactions with other schemes

PIAC maintains the concerns raised in our Discussion Paper Submission regarding the interaction and potential conflict between the protections in the Privacy Act and other Commonwealth schemes such as the Consumer Data Right (CDR).[12]

We do not think that the proposed solution – to develop a privacy law design guide to inform the development of future privacy law frameworks – addresses these concerns regarding overlap and inconsistency between current schemes. We agree with the observation in the Review Report that 'the purpose of the Act is to provide consistent baseline protections for personal information,' and suggest that this should be adopted as the default position for other schemes – that is, the protections in the Privacy Act should be the mimimum protections in any other Commonwealth schemes.

Recommendation 12: minimum privacy protections in all Commonwealth schemes

In addition to or instead of creating a 'privacy design guide', the protections in the Privacy Act should be the minimum afforded in other Commonwealth schemes.

12 PIAC Discussion Paper Submission, 25