Submission No 9

INQUIRY INTO REMEDIES FOR THE SERIOUS INVASION OF PRIVACY IN NEW SOUTH WALES

Organisation: Public Interest Advocacy Centre

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Submission to the Standing Committee on Law and Justice inquiry into remedies for the serious invasion of privacy in New South Wales

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Sophie Farthing, Senior Policy Officer

Level 5, 175 Liverpool Street, Sydney NSW 2000
Phone: 61 2 8898 6500 • Fax: 61 2 8898 6555 • www.piac.asn.au

1. Introduction

The Public Interest Advocacy Centre (PIAC) has a long history as a strong advocate for the protection of privacy rights of Australians. In recent years, PIAC has responded to the various inquiries at both the state and federal level that have considered how privacy would be best protected. Based on experience gained through its legal casework, PIAC has identified that there are significant gaps in the current legal framework for the protection of the right to privacy. It has, accordingly, repeatedly recommended that a statutory cause of action to protect the right to privacy be enacted.

PIAC notes that the reference to the Standing Committee on Law and Justice (**the Committee**) by the Hon Michael Veitch MLC was supported by the Legislative Council. As noted in the Terms of Reference for the inquiry, a statutory cause of action for breach of privacy has already been recommended by the Australian Law Reform Commission (**ALRC**) in a June 2014 report, *Serious Invasions of Privacy in the Digital Era*,[1] and by the NSW Law Reform Commission (**NSW LRC**) in its 2009 report, *Invasion of Privacy*.[2] The Victorian Law Reform Commission (**VLRC**) in its 2010 report, *Surveillance in Public Places*, made a similar recommendation.[3] PIAC urges the Committee to build on the extensive work that has been undertaken by these inquiries.

PIAC also notes the particular context of this latest inquiry: privacy invasions 'are becoming increasingly common with the rapid growth of social media and surveillance and communication technologies'.[4] In announcing the reference the Committee Chair, the Hon Natasha Maclaren-Jones MLC, noted:

> The proliferation of social media has meant that invasions of privacy through online forums, such as the alarming trend of jilted lovers posting sexually explicit photographs of ex-partners on the internet, has immediate and vast reaching repercussions.[5]

In this submission, PIAC draws on its earlier submissions to the ALRC, the NSW LRC and the Department of Prime Minister and Cabinet. PIAC also makes recommendations and comments that consider the more recent types of invasion of privacy, characterised by the use of social media and new technologies.

In short, PIAC believes that there is a significant gap in the current legal framework that means that some victims of serious invasions of privacy are left without a legal remedy. In this submission, PIAC again recommends that a civil cause of action for breach of privacy be created in statute. PIAC submits that there is scope to amend the existing criminal law or create a new

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1 Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era, Final Report* (ALRC Report 123), June 2014, available at https://www.alrc.gov.au/sites/default/files/pdfs/publications/final_report_123_whole_report.pdf.

2 New South Wales Law Reform Commission, *Invasion of Privacy*, Report No 120 (2009), available at http://www.austlii.edu.au/au/other/nswlrc/2009/123.html.

3 Victorian Law Reform Commission, *Surveillance in Public Places*, Report No 18 (2010), available at http://www.lawreform.vic.gov.au/sites/default/files/Surveillance_final_report.pdf.

4 Legislative Council, Standing Committee on Law and Justice, *Media Release: Serious Invasions of Privacy in New South Wales – How adequate are our remedies?*, 6 July 2015, available at http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/02a89e5c25280ab4ca257e7a000c4883/$FILE/Media%20release%20-%20call%20for%20submissions.pdf.

5 Above, note 4.

offence to provide certainty for victims and deterrence for would-be offenders in respect of certain species of invasion of privacy.

1.1 The Public Interest Advocacy Centre

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

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

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from NSW Trade and Investment for its work on energy and water, and from Allens for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

1.2 PIAC's work on privacy

PIAC's advocacy for privacy law reform is based on its legal casework representing victims of privacy invasion. PIAC has provided legal advice, assistance and representation to clients in a number of matters involving alleged breaches of the *Privacy and Personal Information Protection Act 1998* (NSW) (PPIP Act) and the *Privacy Act 1988* (Cth) (Privacy Act).[6]

PIAC has engaged in privacy debates in Australia in recent years, contributing to a number of inquiries and reviews at the national and state level. PIAC has in the past, for example, made submissions regarding the privacy implications of the proposed Health and Social Services Access Card[7] and the proposal by the Australian Bureau of Statistics to implement a longitudinal study in the population census (a proposal requiring capacity to data match over time).[8]

PIAC has more recently contributed submissions to a number of inquiries considering similar questions to the current inquiry, including the Australian Law Reform Commission inquiry into *Serious Invasions of Privacy in the Digital Era,*[9] the Department of Prime Minister and Cabinet

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6 For example, PIAC represented the respondent in *Director General, NSW Department of Education and Training v MT* [2006] NSWCA 270, a landmark case concerning the interpretation of several key provisions of the PPIP Act.

7 Public Interest Advocacy Centre, *Health and Social Services Access Card: Submission to Access Card consumer and Privacy Taskforce, Discussion Paper* (2006); Public Interest advocacy Centre, *Access Card Proposal Still Fails Public Interest Test: Comment on the Exposure Draft of the Access Card Legislation* (2007).

8 Public Interest Advocacy Centre, *Submission to the Australian Bureau of Statistics on Enhancing the Population Census: Developing a Longitudinal View* (2005).

9 Roth, J and Santow, E *Serious Invasions of Privacy in the Digital Era: Submission to the Australian Law Reform Commission* (Public Interest Advocacy Centre), submission of 14 November 2013 available at http://www.piac.asn.au/publication/2013/12/serious-invasions-privacy-digital-era; and 12 May 2014 available at http://www.piac.asn.au/publication/2014/06/serious-invasions-privacy-digital-era.

(DPM&C) considering a Commonwealth statutory cause of action for serious invasion of privacy[10] and the Unified Privacy Principles,[11] the Australian Law Reform Commission (ALRC) in response to its Discussion paper 72,[12] and the NSW Law Reform Commission's privacy inquiry (NSWLRC), in response to Consultation Paper 3[13] and Consultation Paper 1.[14]

2. The importance of privacy

2.1 Guiding principles

The right to privacy is one of the cornerstones of modern democracy, established as such during the modern development of the international human rights framework in the twentieth century. The right to privacy seeks to protect fundamental aspects of human existence. It is a right that many take for granted, but once breached the impact of its loss is almost invariably significant.

The right is clearly articulated in international law. It is recognised in the Universal Declaration of Human Rights (UDHR) and various international and regional instruments and treaties to which Australia is a signatory.[15] Article 17 of International Covenant on Civil and Political Rights (ICCPR) provides:

> 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
> 2. Everyone has the right to the protection of the law against such interference or attacks.[16]

In the domestic context, the right to privacy has been specifically enshrined in the human rights legislation of the Australian Capital Territory and Victoria. Section 13 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and s 12 of the *Human Rights Act 2004* (ACT) provide that a person has the right not to have his or her privacy, family, home or correspondence unlawfully interfered with, and not to have his or her reputation unlawfully attacked.

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10 Elizabeth Simpson, *It's time: Submission in response to the Department of Prime Minister and Cabinet's Issue Paper – A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy* (17 November 2011) Public Interest Advocacy Centre http://www.piac.asn.au/publication/2011/11/its-time-submission

11 Robin Banks, *Unified Privacy Principles – the right way ahead: comments to the Federal Department of Prime Minister and Cabinet on the draft UPPs* (2 February 2009) Public Interest Advocacy Centre http://www.piac.asn.au/publication/2009/02/090202-piac-upp-sub.

12 Anne Mainsbridge and Robin Banks, *Resurrecting the Right to Privacy: Response to the Australian Law Reform Commission Discussion Paper 72: Review of Australian Privacy Law* (21 December 2007) Public Interest Advocacy Centre http://www.piac.asn.au/sites/default/files/publications/extras/07.12.21-PIAC_Sub_to_DP72.pdf.

13 Public Interest Advocacy Centre, *Improving clarity and enhancing protection of privacy rights: response to the NSW Law Reform Commission's Consultation Paper 3: Privacy Legislation in NSW* (24 December 2008) Public Interest Advocacy Centre http://www.piac.asn.au/publication/2009/01/081224-piac-nswprivacy.

14 Anne Mainsbridge, *Matching Rights with remedies: a statutory cause of action for invasion of privacy; Submission to the NSW Law Reform Commission Consultation Paper 1 – Invasion of Privacy* (3 October 2007) Public Interest Advocacy Centre http://www.piac.asn.au/publication/2007/10/071003-nswlrcprivacy-submission.

15 See, for example, Article 8 of the *European Convention of Human Rights*; Article 14 of the United Nations *Convention on the Protection of the Rights of all Migrant Workers and Members of their Families* A/RES/45/158 (22 February 1991); and Article 16 United Nations *Convention on the Rights of the Child* UNGA Doc A/RES/44/25 (12 December 1989).

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

It should be noted that as important as the right to privacy is to individuals, it is not an absolute right; any statutory cause of action will have to reflect this. Under international human rights law, privacy must accommodate certain other human rights and interests, especially freedom of expression. Similarly, under international and domestic Australian law, freedom of expression is itself not absolute.

The starting point in determining how privacy and freedom of expression should accommodate each other is provided by international law itself. As a derogable (that is, non-absolute) right, privacy can be limited when such limitations are 'prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others'.[17] A human rights analysis assists in the balancing of privacy and other values and interests, but the values and interests must be clearly defined, in order to avoid an overly wide interpretation. For example, it would be inappropriate for privacy, as a fundamental human right, to be traded off against business interests or an interest in the dissemination of gossip.

In addition, the common law has long recognised that the public interest requires the maintenance of freedom of expression. This relates to the free flow of information, the freedom to hold and impart ideas and the right of the public to be informed on matters of public interest. PIAC notes that some jurisdictions take into account the 'newsworthiness' of information when considering whether or not the right to freedom of expression should qualify the right to privacy.[18] PIAC considers that this test is too broad, and risks privileging freedom of expression over privacy to the extent that a statutory cause of action for the protection of privacy could be rendered meaningless.

2.2 The impact of new technology on personal privacy

As noted by the Committee when announcing the inquiry, new technology has led to privacy invasions in relation to which the current legal framework cannot provide any remedy.[19] The Hon Michael Kirby AC CMG has noted 'the extraordinary capacity of technology today to offer fresh ways of invading privacy'.[20] There can be no doubt that technological developments, such as the internet and digital technologies, have made individual privacy increasingly vulnerable to attack. For example, technology now exists that makes it possible for security agencies to track people via their mobile phones and to obtain information about their internet use effectively in real-time.[21]

There is also an increased incidence of surveillance in all areas of public life, frequently justified as a counterterrorism measure. The *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015*, for example, represents a significant shift in the privacy sphere. The Act, requiring telecommunications service providers to retain their customers' metadata for a number of years, is a disproportionate interference with the right to privacy, justified as a legitimate measure in the context of the national security debate. It could certainly be argued that

17 Ibid., art 18(3).

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

19 See Legislative Council, Standing Committee on Law and Justice *Media Release: Serious Invasions of Privacy in New South Wales – how adequate are our remedies?* 6 July 2015, available at http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/02a89e5c25280ab4ca257e7a000c4883/$FILE/Media%20release%20-%20call%20for%20submissions.pdf.

20 The Hon Justice Michael Kirby, 'Privacy – In the Courts' (2001) 24(1) *University of NSW Law Journal* 247.

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

the ease with which the right to privacy is impeded in the political sphere undermines the importance of the right and to what extent it should be protected and promoted in Australian society.

Given these developments, it is entirely appropriate that the adequacy of current remedies for invasion of privacy be reviewed.

3. Are existing remedies for serious invasions of privacy adequate?

Based on PIAC's casework experience and more broadly working with vulnerable communities, PIAC believes that the current framework in NSW does not adequately protect our privacy rights. Various aspects of the right to privacy are given limited protection by disparate statutes and the common law, including:

- privacy legislation, primarily focused on protection of personal data;
- the equitable doctrine of breach of confidence;
- complaints to the Office of the Privacy Commissioner; and
- some criminal law offences.

This patchwork of legal protection, which has not been developed with the intention to comprehensively remedy invasions of privacy, inevitably leaves significant gaps. For this reason PIAC recommends legal reform, which would bring NSW into line with regimes for the protection of privacy in overseas jurisdictions. There are statutory causes of action for breach of privacy, for example, in Ireland[22] and some Canadian provinces (British Columbia,[23] Manitoba,[24] Saskatchewan[25] and Newfoundland[26]).

3.1 The current civil law framework

3.1.1 Privacy legislation

The primary problem with the current regulatory framework in NSW for the protection of privacy is that it fails to protect against invasions of privacy that involve interference with one's person or territory. The PPIP Act in NSW and the Privacy Act in the federal jurisdiction both focus on information privacy and protection of data.

Even then, there are also a series of exemptions in privacy legislation, which are overly broad in their scope and serve to undermine the effectiveness of the Acts. Some of these include:

- the exemption for 'employee records';[27]
- the exemption for small businesses;[28] and

22 *Privacy Act 2006* (Ireland).
23 *Privacy Act*, RSBC 1996, c 373 (British Columbia).
24 *Privacy Act*, CCSM, 1987, cP125 (Manitoba).
25 *Privacy Act*, RSS 1978, cP-24 (Saskatchewan).
26 *Privacy Act,* RSNL 1996, cP-22 (Newfoundland).
27 *Privacy Act 1988* (Cth) s 7B(3).
28 *Privacy Act 1988* (Cth) s 6C(1). The effect of this provision, when read in conjunction with the definitions of 'small business' and 'small business operator' in section 6D is that businesses with an annual turnover of $3 million or less have been exempt from the *Privacy Act 1988* (Cth). This exemption has been heavily criticised, as an estimated 94 per cent of businesses fall below the limit. In 2007 the ALRC recommended the removal of the small business exemption: see Rec 39-1 in Australian Law Reform Commission, *Report 108 - For Your Information: Australian Privacy Law and Practice* (2008), http://www.alrc.gov.au/publications/report-108>.

- the exemption for 'media organisations'.[29]

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

3.1.2 Breach of confidence

The equitable doctrine of breach of confidence provides for a civil law remedy where information provided in confidence, in circumstances where there is a pre-existing obligation of which the defendant is aware, is communicated to a third party.

Relying on breach of confidence to protect against breaches of privacy has been considered by the High Court. In *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*,[30] the High Court considered that instead of creating a new tort by way of common law development, privacy may be adequately protected by 'looking across the range of already established legal and equitable wrongs'.[31] Gleeson CJ specifically considered that breach of confidence would cover the communication of videoed activity where there was a reasonable expectation that the activity would be held in confidence.[32]

The possibility of breach of confidence being a viable option to protect personal privacy in the modern digital age was considered by the ALRC. It noted:

> It is now well accepted in the United Kingdom and Australia that an obligation of confidence may arise where a party comes into possession of information which he or she knows, or ought to know, is confidential. This extension of the law makes the equitable action for breach of confidence a powerful legal weapon to protect individuals from the unauthorised disclosure of confidential information, although there is still some uncertainty in Australia as to what compensation is available in an equitable action for breach of confidence.[33]

As noted by the ALRC, the primary issue in relying on breach of confidence to protect personal privacy lies in the uncertainty of remedies available. Generally, the equitable action has been considered to be more effective in preventing breach of privacy rather than providing compensation after the fact. As noted by the ALRC, an injunction is easily obtained where the duty is established:

> [C]ourts considering injunctions to restrain a breach of confidence do not exercise any special caution in the interests of free speech or other broadly defined public interests. The courts in both equitable and contractual cases emphasise that, when granting an injunction to restrain a

29 *Privacy Act 1988* (Cth) s 7B(4).
30 [2001] HCA 63.
31 Ibid, at [132].
32 Ibid, at [430].
33 Above, note 1, at [3.48].

> breach of confidence, they are holding the defendant to his or her pre-existing commitment or obligation, usually voluntarily undertaken, not to disclose the plaintiff's confidential information.[34]

There has been some recent development in the use of the equitable doctrine to provide compensatory relief for plaintiffs who have been subjected to online embarrassment and shaming. In a 2015 case in the Western Australian Supreme Court, for example, Mitchell J considered an action for breach of confidence in circumstances where a jilted partner distributed explicit photographs and videos of his former partner on his Facebook page.[35] Mitchell J agreed with the approach taken by the Victorian Court of Appeal in a similar case[36] that breach of confidence should be developed by

> extending the relief available for the unlawful disclosure of confidential information to include monetary compensation for the embarrassment and distress resulting from the disclosure of information (including images) of a private and personal nature.[37]

This accords with the approach taken by the ALRC. The Commission considered that if no statutory tort for invasion of privacy is enacted, then an action for breach of confidence would be the most likely avenue by which the common law may develop protection for breach of privacy. It accordingly recommended that

> appropriate federal, state and territory legislation should be amended to provide that, in an action for breach of confidence that concerns a serious invasion of privacy by the misuse, publication or disclosure of private information, the court may award compensation for the plaintiff's emotional distress.[38]

For reasons outlined in further detail below, PIAC believes there is a need to enact a statutory cause of action rather than leaving protection of privacy to the slow and uncertain development of the common law.

3.1.3 Complaints to the Office of the Privacy Commissioner

Another avenue to seek redress for breach of personal privacy is by way of complaint to the Office of the Privacy Commissioner. In PIAC's experience, this avenue does not provide the complainant with appropriate relief after a significant invasion of their privacy.

PIAC, for example, represented a woman who was detained at an immigration detention centre following a raid by the Department of Immigration and Citizenship on a massage parlour. A journalist and photographer from the *Daily Telegraph* accompanied the Department on the raid and a few days later an article about the raid was published in that newspaper. The article did not disclose our client's name, but identified her nationality and the fact that she had been detained at an immigration detention centre, naming the centre. At the time, she was the only

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34 ALRC, above, note 1, at [12/132].
35 *Wilson v Ferguson* [2015] WASC 15.
36 In *Giller v Procopets* [2008] VSCA 236; (2008) 24 VR 1.
37 Above, note 35, at [83].
38 ALRC, above, note 1, Recommendation 13-1.

woman of that nationality at the detention centre and so was identified by members of her community and fellow detainees.

She subsequently suffered harassment and was ostracised by her family and community.

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

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

3.2 Lack of protection in the criminal law

There are some criminal offences that, depending on the facts in question, can be resorted to where there has been a serious invasion of privacy.

Section 545B of the *Crimes Act 1900* (NSW), for example, provides for an offence of intimidating or annoying a person by violence or otherwise where it is intended to compel another person to do or abstain from doing any act they have a right to do. 'Intimidation' is defined to include the cause of 'reasonable apprehension of injury to a person or to any member of his family or to any of his dependants', encompassing injuries 'in respect of his property, business, occupation, employment, or other source of income, and also includes any actionable wrong of any nature'.

Section 91L makes it an offence to film another person's private parts for sexual gratification 'in circumstances in which a reasonable person would reasonably expect the person's private parts could not be filmed' without the person's consent and knowing that consent has not been given.

Most relevant to the distribution by email or social media of explicit photos or video by an ex-partner is s 578C(2) of the Crimes Act. This provision makes it an offence to 'publish' an 'indecent article'. While 'indecent' is not defined, 'article' is defined to include any thing that is to be read or looked at, or that is a record. 'Publish' is defined to include the distribution, dissemination, circulation, delivery or exhibition of the indecent article. The provision has been used in at least one reported case to address an act of 'revenge porn'.[39] In that case, the defendant posted six intimate photos of the complainant to his Facebook page, notifying the complainant by email that he had done so. The defendant was given a suspended sentence of six months' imprisonment. The potential, however, for the provision to apply to a broader range of privacy invasion is unclear. The applicability of the provision will depend on the facts of each case.

[39] *Usmanov v R* [2012] NSWDC 290.

There are no criminal offences in NSW that comprehensively and reliably apply to the more recent examples of the distribution of intimate photos with the intent to cause harm to the subject; so-called 'revenge porn'. In contrast, new offences enacted in South Australia in 2013 and Victoria in 2014 clearly target the distribution of intimate photos and video where the subject of the photo or video has consented to the filming, but not the distribution. Section 26C(1) of the *Summary Offences Act 1953* (SA), for example, states:

> A person who distributes an invasive image of another person, knowing or having reason to believe that the other person:
> (a) does not consent to that particular distribution of the image; or
> (b) does not consent to that particular distribution of the image and does not consent to distribution of the image generally.

In addition to the lack of a specific criminal offence in NSW, in some instances there has been a failure to enforce criminal laws that are intended to protect privacy. For example, s 11 of the *Children (Criminal Proceedings) Act 1987* (NSW) (Children Criminal Proceedings Act) makes it a criminal offence to publish or broadcast the name, or any identifying information, of a young person who is involved in criminal proceedings at any time before, during or after the proceedings. Despite this, the media occasionally identify children and young people involved in criminal proceedings in NSW.[40]

In PIAC's experience, criminal proceedings are rarely initiated where an offence pursuant to s 11 of the Children Criminal Proceedings Act has been committed. As this offence provision is rarely enforced, children and their families often endure negative consequences beyond the punishment meted out by the criminal justice system. For example, PIAC is aware of children who have experienced significant difficulties securing placements in schools and other educational and vocational institutions as a result of public disclosure of their involvement in the criminal justice system. A general right to take legal action for invasion of privacy would help to address the mischief that the NSW legislation was intended to address.

4. Does there need to be additional civil remedies for breach of privacy?

4.1 Gaps in the current legal framework

In recent years, the deficiencies in the current system of privacy have become clearer. For example, a person may have no legal recourse and/or remedies in the following circumstances:

- A man with an intellectual disability is filmed without his knowledge or consent while he is defecating in a public place. The film is subsequently shown on the internet.[41]

[40] For example, Channel 7's Today Tonight program broadcast a story on 1 March 2005 that directly identified 'DR', one of two young persons killed as a result of a motor vehicle collision following a police pursuit in Macquarie Fields. The story also made false claims about DR's criminal history. In 2008, Ten News, Nine, Seven, Fairfax and News Ltd reported on a NSW man who allegedly murdered his wife and step-daughter and threw their bodies off a cliff in the Blue Mountains, identifying both victims and the girls' step-father. Interestingly, ABC did not name the victims or alleged perpetrator as they thought it would be in breach of s 11.

[41] This is based on a real situation.

- Personal information about a convicted inmate is disclosed to the media by the Department of Corrective Services. The inmate's spouse and children suffer hurt, humiliation and distress as a result. Although they can bring a complaint before the relevant public authority, they are not entitled to any monetary compensation if the complaint is upheld.[42]
- A NSW Police officer releases the name of a person suspected of a crime to the media, and asserts that the information related to 'core policing functions'.[43]
- A teenage girl suffers humiliation and distress upon finding out that she was secretly filmed while getting changed at a swimming pool. The girl has no means of seeking compensation.[44]
- A man left a copy of a video-tape of him having sex with an ex-girlfriend with her father, showed the tape to another person and threatened to show it to her employee. The court concluded that there was no legal redress.[45]

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

Enacting a civil cause of action and ensuring that the criminal law encompasses serious invasions of privacy would also accord with the public interest. Most Australians regard privacy as important and expect a high level of privacy protection. A 2013 survey commissioned by the Office of the Australian Information Commissioner found that technological developments have increased Australians' privacy concerns. In particular, Australians believe the biggest privacy risks facing people are online services, including social media sites. A quarter of those surveyed felt that the identity fraud and theft was the biggest risk, and 30% of respondents claimed that they provide false information as a way of protecting their privacy.[46]

The importance of the right to privacy is also reflected in the number of inquiries and reviews which have, in recent years, looked into this issue and recommended that remedies for invasion of privacy be created in the civil and criminal law.

4.2 Advantages of a new statute over common law development

PIAC believes that a statutory cause of action is necessary, as opposed to the recognition of a cause of action for breach of privacy to be left to incremental development of common law through the courts or incremental expansion of the criminal law. The reluctance of superior courts to date to embrace the cautious invitation extended by the High Court in *Australian Broadcasting*

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

43 Section 27 of the *Privacy and Personal Information Protection Act 1998* (NSW) gives the NSW Police an exemption from the Information Protection Principles other than in relation to their administrative and educative functions. See *HW v Commissioner of Police, New South Wales Police Service and Anor* [2003] NSWADT 214 and *GA v Police* [2005] NSWADT 121.

44 This is based on a real situation. See Linda McKee, 'Secretly filmed teen girl has two weeks to appeal verdict' (12 October 2007) Belfast Telegraph, <http://www.belfasttelegraph.co.uk/news/local-national/secretly-filmed-teengirl-has-two-weeks-to-appeal-verdict-13482843.html>.

45 *Giller v Procopets* [2004] VSC 113.

46 Office of the Australian Information Commissioner, *Community Attitudes to Privacy survey, Research Report 2013*.

Corporation v Lenah Game Meats Pty Ltd[47] to develop a tort of privacy in Australia[48] suggests that common law development of such a tort may take a long time, and that it may never actually happen at all. A new statutory cause of action would accord with public expectation that victims of invasion of privacy are not left without recourse to a legal remedy.

The creation of a statutory cause of action would have the following advantages over common law development:

- it is a less time-consuming process than waiting for appropriate cases to come before the courts;
- it provides greater certainty and uniformity by clarifying rights and responsibilities;
- it allows respondents to understand the scope of their obligations, to predict whether or not their conduct will give rise to legal liability for breach of privacy and to put into place appropriate procedures to minimise the risk of a breach;
- it avoids the need to try to fit breaches of privacy into pre-existing legal actions, such as breach of confidence;
- it does away with the distinction between equitable and tortious causes of action and allows for a more flexible approach to damages and remedies; and
- it strengthens the recognition of privacy in the law as 'a right in itself deserving of protection'.[49]

Set out below are PIAC's recommendations detailing the elements of a civil cause of action and the possible creation of a new criminal offence.

5. A civil cause of action: elements

5.1 A new tort in new legislation

PIAC supports the creation of a new, stand-alone act that would contain a statutory cause of action for the serious invasion of privacy. PIAC's preference is for legislation to be enacted in the federal jurisdiction to ensure there is consistency across all states and territories. The challenge of the current age is of course that while a sexually explicit photograph may be taken of someone in NSW, the breach of privacy which occurs may well be in another state or territory when it is posted to the internet. Having said that, PIAC urges the Committee to recommend that the NSW Parliament enact legislation as a matter of priority to protect breaches of privacy in NSW, with the hope that this may push the Federal Government to similarly address the issue as recommended by the ALRC.

Any legislation providing for a new cause of action for the invasion of privacy should expressly extinguish any common law privacy rights. PIAC supports the conclusion drawn by the ALRC that challenging a breach of privacy should be expressed as a tort, rather than as a right of action for the invasion of privacy.

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47 (2001) 208 CLR 199.

48 See, for example, *Giller v Procopets* [2004] VSC 113 and *Kalaba v Commonwealth of Asutralia* [2004] FCA 763 cf *Grosse v Purvis* (2003) QDC 151 and *Jane Doe v Australian Broadcasting Corporation & Ors* [2007] VCC 281.

49 *Jane Doe v Australian Broadcasting Corporation* [2007] VCC 281, [157] to [161].

5.2 First element of the action: serious invasion of privacy

PIAC supports the conclusion drawn by the ALRC that there should be two forms of invasion of privacy which form the first element of the tort. The ALRC recommended a plaintiff be required to prove

- there has been an intrusion of their seclusion or private affairs, including by unlawful surveillance, such as by taking a photo of someone in a change room; or
- there has been a misuse or disclosure of information about their information, such as disclosure of their medical records to a newspaper or posting sexually explicit photographs of the person on the internet.[50]

PIAC submitted to the ALRC that any new legislation should contain a non-exhaustive list of examples of conduct that may be an invasion of privacy.[51] This would provide the courts (and the parties) with some guidance, and provide certainty and clarity by giving context to the cause of action and the circumstances in which it might arise. PIAC believes there needs to be sufficient flexibility in the Act for it to be appropriately adapted to changing social and technological circumstances. While providing a conclusive definition of the term 'privacy' would limit this flexibility, PIAC appreciates the need for a cause of action to be defined.

While PIAC supports the definition of the cause of action, it recommends that there be a non-exhaustive list of examples included, such as interference with a person's home or family life or where an individual's correspondence or private, written, oral or electronic communication has been interfered with, misused or disclosed.[52]

PIAC also recommends that the cause of action 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.

5.3 Second element of the action: intentional, reckless or negligent invasion of privacy

PIAC considers that the new tort should provide for intentional, reckless and negligent invasions of privacy.[53] PIAC believes that 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 plaintiff as that of a deliberate or reckless breach.[54] An organisation, for example, with inadequate security procedures might unknowingly release personal information about a number of its clients. It is undesirable that victims of these privacy breaches should have no legal recourse.

5.4 Threshold test for 'serious' invasions of privacy

PIAC believes that the new tort should be actionable where a person in the position would have a 'reasonable expectation' of privacy in the circumstances, measured by an objective standard.

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50 ALRC, above note 1, at page 73.

51 See above, note 9.

52 As recommended by the ALRC in *Report 108: For your information: Australian Privacy Law and Practice* (2008), available at http://www.alrc.gov.au/publications/report-108.

53 As submitted to the ALRC, see above, note 9, at page 6.

54 In recommending that negligent breaches of privacy form the second element of the tort, PIAC departs from the view of the ALRC, which recommended that the new tort be confined to intentional or reckless invasions of privacy and not extend to negligent invasions of privacy. See above, note 1.

PIAC believes that the 'reasonable expectation' test is fluid enough to take account of factors such as the nature and incidence of the act, conduct or publication, the age and circumstances of the plaintiff, the relationship between the parties and the place where the alleged invasion of privacy took place. This is the standard recommended by the ALRC, NSWLRC and VLRC.[55]

PIAC supports the recommendation of the ALRC that a non-exhaustive list of matters be included to assist the court to conclude whether the plaintiff would have had a reasonable expectation of privacy in all of the circumstances. These matters include, for example,

- the nature of the private information, including whether it relates to intimate or family matters, health or medical matters, or financial matters;
- the place where the intrusion occurred; and
- the purpose of the misuse, disclosure or intrusion.[56]

In addition to the nine factors proposed by the ALRC, PIAC suggests that 'cultural background' should be expressly included when a court considers the relevant attributes of the plaintiff. In PIAC's experience of working with Aboriginal and Torres Strait Islander Australians there are cultural expectations of privacy that will be relevant and may require specific consideration.

PIAC also endorses the conclusion of the NSWLRC that the 'extent to which the individual is or was in a position of vulnerability' should be a factor to be considered when determining if there was an invasion of privacy.[57]

5.5 Defences

PIAC believes legislation should provide for a number of defences to invasion of a person's privacy. As outlined above, the right to privacy is not an absolute right. These means that in some circumstances the right must give way to certain countervailing rights and interests such as the right to freedom of expression.

PIAC considers the following defences should be included in any legislation:

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

Regarding the final 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 VLRC, namely, that it is most appropriate for competing public interests to be one of a number of defences to the proposed cause of action. This is converse to the view of the ALRC and the NSWLRC that different public interests should be incorporated into the cause of action itself.

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55 ALRC, above note 52, Rec74-2; VLRC, above note 3, Rec's 24, 25; NSWLRC, above note 2, at 24.
56 ALRC, above note 1, Recommendation 12-2.
57 NSWLRC, above note 2, Draft Bill, cl 74(3)(a)(v).

PIAC agrees with the VLRC's recommendation that the public interest defence should specify that 'public interest is a limited concept and not any matter the public is interested in'.[58]

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

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

PIAC also warns 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 is no need for general exemptions.

5.6 Proof of Damage

PIAC believes that any new legal action in privacy should be actionable *per se*. That is, PIAC considers that it would be inappropriate and potentially very restrictive to require a plaintiff to prove that any actual loss or damage arose from the alleged invasion of privacy. In many cases, there will be a lack of clear, provable damage arising from a breach of privacy. This is unsurprising: privacy is a human right. As such, it is designed to protect a facet of one's individual dignity. One's dignity is vitally important but its intrinsic nature makes it difficult to quantify in monetary terms the impact of any damage to it.

The majority of the clients for whom PIAC has acted in breach of privacy matters have suffered distress, humiliation and insult as a result of invasions of their privacy, rather than any provable psychiatric or economic damage. In some cases, the effect of a breach of privacy may simply be to stop someone doing something that they would normally do. For example, if they have been subjected to unauthorised surveillance, they may feel reluctant to leave their home. In this type of situation, it is difficult to point to any provable damage in a legal sense.

PIAC notes that the privacy statutes of the various Canadian states with privacy legislation all provide that the tort of violation of privacy is actionable *per se.*[59] This was also the approach recommended by the ALRC, NSWLRC and the VLRC. PIAC supports this approach. Privacy is a fundamental right; it should not be necessary to prove damage arising from its breach.

5.7 Damages & remedies

PIAC agrees with the approach taken by the NSWLRC and 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 his or her privacy. Breaches of privacy may arise in a wide range of circumstances, and it therefore seems appropriate that the available remedies reflect the varying impact that the invasion may have. In many of the privacy cases that PIAC has dealt with, the clients have been

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58 VLRC, above note 3, at 7.187.

59 *Privacy Act* RSBC 1996 (British Columbia), c 373, s 1(1); *Privacy Act* RSS 1978, cP-24 (Saskatchewan) s 2; *Privacy Act* CCSM cP125 (Manitoba) s 2(1); *Privacy Act* RSNL 1990 cP-22 (Newfoundland and Labrador) s 3(1).

less concerned with obtaining compensation than they have been with obtaining a comprehensive and meaningful apology from the respondent.

Accordingly, PIAC supports a range of possible remedies for breach of privacy, including

- monetary damages compensating for economic and non-economic loss;
- exemplary damages;
- an order requiring the defendant to apologise to the plaintiff;
- a correction order;
- an order for the delivery up and destruction of material;
- an order requiring implementation of a policy or procedures;
- a declaration;
- other remedies or orders that the Court thinks appropriate in the circumstances.

PIAC also submits that the court be empowered to deal with systemic breaches of privacy. It is not uncommon for conduct breaching privacy to be widespread, institutionalised and affect large numbers of people. For example, as mentioned earlier, there are numerous instances in which the media have released personal information about young people who have become involved in the criminal justice system. This impacts adversely on the young people and also on their families.

PIAC notes that the Anti-Discrimination Tribunal (**ADT**) is empowered to make orders extending to the conduct of the respondent that affects persons other than the person who lodged the complaint.[60] This allows the ADT to address identified situations of systemic discrimination. PIAC recommends the inclusion of a remedy that expressly gives the court power to order implementation of policy or procedures to protect against repetition of the breach. This would be similar to the ADT's power to order the respondent to a vilification complaint to develop and implement a program or policy aimed at eliminating unlawful discrimination. PIAC submits that a similar provision in any legislation dealing with invasion of privacy would help to prevent further breaches of privacy and would also assist in bringing about cultural change in organisations that fail to take their privacy obligations seriously.

5.8 Ensuring access to justice

In previous submissions on this issue, PIAC has argued that it is vitally important that any statutory cause of action for invasion of privacy be accessible to those seeking to use it.[61] Without ensuring access to justice, there is a risk that any breach of privacy action could become the sole province of celebrities and those wealthy enough to afford to pay for legal representation and run the risk of incurring an adverse costs order in the even that they are unsuccessful.

Measures to ensure that the cause of action is accessible include:

- The statute should provide that parties to proceedings should generally bear their own costs and that costs orders should only be made in exceptional circumstances (for example, where the complaint is vexatious). This is likely to protect genuine complainants having costs orders made against them if they are unsuccessful. However, the legislation should be sufficiently

[60] Section 108(3) of the *Anti-Discrimination Act* provides 'An order of the Tribunal may extend to conduct of the respondent that affects persons other than the complainant or complainants if the Tribunal, having regard to the circumstances of the case, considers that such an extension is appropriate'.

[61] See above, note 2, at 6.

flexible to allow the making of awards of costs in circumstances where a respondent has acted unreasonably in defending the complaint, or the amount of compensation recovered by the complainant is inadequate to cover their own legal costs.[62]
- The statute should provide for representative proceedings and class actions to be taken, so as to reduce the burden on individual complainants.
- The statute should provide that in certain circumstances (perhaps involving matters of serious or systemic privacy invasion) the NSW Privacy Commissioner may initiate a complaint.

6. Is there a need for a new criminal offence?

PIAC supports the definition of certain serious breaches of privacy as criminal conduct. While care must be taken in the formulation of any criminal offence to ensure that it does not unduly infringe the rights of others or unnecessarily criminalise individuals, it is clear that victims of egregious invasions of privacy ought to be protected. It is also apparent that deterrence for intentionally breaching the privacy of another person would be of public benefit.

Providing for a criminal law solution for particular invasions of privacy is also important when taking into account the limitations of civil litigation for victims of breach of privacy, even if a new tort of breach of privacy is enacted. Civil litigation can be expensive, lengthy, and requires a number of initial hurdles to be overcome, such as satisfying limitation periods. In PIAC's experience, civil litigation is beyond the reach of many, particularly those who are marginalised and disadvantaged in our community.

One possible solution would be to amend the s 578C offence, outlined above, of publishing indecent articles. Amendment could clarify and expand the scope of the offence, for example, by defining 'indecent' and providing that 'publishing' involves sending the indecent article to a single person (for example, the operator of a 'revenge porn' website).[63] Any amendment would also have to ensure that the offence captures only non-consensual publication, where the intent of the sender is to cause harm to the person who is the subject of the publication.

Alternatively, PIAC would support the enactment of a new, targeted offence of distributing an intimate image without the consent of the subject and with the intention of causing harm. The circumstances should be considered aggravated if it consists of invading the privacy of vulnerable groups including minors, people with disability, people in detention and people with mental illness.

62 *Jordan v North Coast Area Health Service (No. 3)* [2005] NSWADT 296.

63 For a comparative perspective see Gotsis, T (2015) *E-brief: Revenge pornography, privacy and the law* (NSW Parliamentary Research Service), August 2015, e-brief issue 7/2015.