
**Review of the *Privacy Act*
1988 (Cth)**

Legal Aid NSW submission to
the Attorney-General's
Department

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Table of Contents

About Legal Aid NSW	3
Introduction	4
The need for effective privacy protection	6
Guidance from international law	6
A direct right of action	7
Access to Justice	8
Is a Statutory tort of privacy needed?	10
Reasons for an Express Civil Right of Action	11
Developing a robust privacy protection regime	12
The Principle of Compensation	15
Assessing Quantum	15
Development of Precedent	17
How the tort should be framed	17
Annexures	19

About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 25 offices and 243 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged. We offer telephone advice through our free legal helpline LawAccess NSW.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 27 Women's Domestic Violence Court Advocacy Services, and health services with a range of Health Justice Partnerships.

The Civil Law Division provides advice, minor assistance, duty and casework

services from the Central Sydney office and 20 regional offices. It focuses on legal problems that impact on the everyday lives of disadvantaged clients and communities in areas such as housing, social security, financial hardship, consumer protection, employment, immigration, mental health, discrimination and fines. The Civil Law practice includes dedicated services for Aboriginal communities, children, refugees, prisoners and older people experiencing elder abuse.

Legal Aid NSW has significant expertise in the area of human rights and privacy law, with a dedicated team of human rights specialists in its Civil Law Division. Grants of legal aid are available for matters concerning breaches of privacy, civil liberties and matters of public interest.

Legal Aid NSW welcomes the opportunity to make a submission to the Attorney-General's Department's review of the *Privacy Act 1988* (Cth). Should you require any further information, please contact:

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Introduction

Legal Aid NSW welcomes the opportunity to make a submission to the Attorney-General's Department's review of the *Privacy Act 1988* (Cth) (**the Act**). We consider this review affords an opportunity to redress both gaps in the law and the risks of inconsistent levels of protection.

Our submission is informed primarily by the extensive experience of lawyers from our Civil Law Division who represent clients with tortious claims and privacy complaints under our civil liberties policy and guideline. We focus on Questions 56 through 62 of the *Issues Paper* in this submission with regards to a "Direct Right of Action" and "A Statutory Tort of Privacy" as those questions directly relate to our practice experience. We draw on the experience of our clients in areas of life where their privacy is often breached, such as in contact with police or the criminal justice system, in order to make a case for why current legal protections are deficient, and why a statutory tort of privacy is necessary. We also point to longstanding causes of action - such as the intentional torts of battery and false imprisonment - which may inform the development of the tort of privacy in Australia.

Our Clients

Legal Aid NSW focusses its services on the needs of people who are socially and economically disadvantaged. Our key priority clients include young people, people with disabilities, prisoners, Aboriginal and Torres Strait Islander people, people who are homeless or at risk of homelessness, the elderly, people at risk of domestic and family violence, and people living in regional and remote areas. All of these groups may have difficulty accessing legal services for different reasons. Their level of disadvantage often manifests in multiple and intersecting ways which tends to complicate their capacity to both protect and enforce breaches of privacy. Government agencies also tend to hold highly sensitive information about these groups, such as information about their health care and mental health, disabilities, criminal history, social security, and other information which if disclosed, could expose them to indignity, embarrassment, reputational damage, harassment or even the risk of violence.

The rapidly changing technology landscape exacerbates these risks for socio- and economically disadvantaged people. The propagation of personal information and the proliferation of automated data processing among government and commercial entities means that it is becoming increasingly difficult to manage where and how one's personal information is used, shared and stored. This complexity compounds the existing barriers faced by vulnerable people who are more likely to be excluded from accessing new technologies and who may not be familiar with the avenues available to monitor such issues.¹

For example, many clients who have spent time in custody lack a basic understanding of new technologies or the systems and databases which operate behind them. As one of

¹ See Australian Competition and Consumer Commission, *Digital Platforms Inquiry* (Final Report, June 2019), 442-448.

our Case Studies below illustrates, a person with a mental health condition like anxiety may react differently to disclosure of personal information by a government agency than someone without that condition.

By contrast, in the experience of our solicitors, while children and young people have a high uptake of digital technologies, they may lack the legal capacity to consent to sharing their personal information and often do so without understanding complex terms and conditions. Our case experience also suggests that young people experience breaches of their privacy when they are in contact with police in public. The routine confiscation and examination of mobile phones by police officers during a warrantless stop and search is a practice without a clear lawful basis, yet it often results in officers viewing personal data which is irrelevant to the reason for the stop.

Effective privacy protections may also operate as a further protection against other human rights abuses. Adequate protections and remedies can help to ensure that agencies that *do* hold sensitive personal information cannot use that information to categorise or target certain people in a way that leads to discriminatory treatment.

Executive Summary

Legal Aid NSW supports many of the recommendations made by the Digital Platforms Inquiry as well as the Australian Law Reform Commission, with some additions and amendments. We agree with the Australian Law Reform Commission (**ALRC**) and the Australian Competition and Consumer Commission (**ACCC**) that the current technological context makes the effective and comprehensive protection of the right to privacy imperative.

Legal Aid NSW strongly submits that individuals be given a direct right to bring actions and class actions against Australian Privacy Principles (**APP**) entities in court for compensatory, aggravated and exemplary damages. Overall, we submit that this direct right of action would be most appropriately construed via a statutory cause of action in tort; much like the causes of action for other torts which already protect other individual rights in Australia.

A statutory cause of action in tort has several advantages:

1. it serves a deterrence function by ensuring that any agency or body which engages in a privacy breach can be held accountable for a breach;
2. it allows victims of a privacy breach the opportunity to be placed back into the position they would have been in had the breach not occurred – that is, courts could apply compensatory principles when determining tortious claims which over time would bring outcomes into line with comparable claims like defamation;
3. it would ensure that victims of a privacy breach receive an appropriate quantum of damages for that breach; and
4. it would allow the development of a body of precedents in the area of privacy law.

Although a statutory cause of action is essential, Legal Aid NSW also submits that there should be an alternative, independent no cost option available to complainants should they require it. We say that the most appropriate course is that filing a tortious claim in

court be made available as an option in addition to a no cost conciliation via an administrative body (such as the Office of the Australian Information Commissioner (**OAIC**)).

Legal Aid NSW agrees with many of the recommendations of the ALRC with respect to how a tort for breach of privacy should be framed. Specifically, we agree that:

- a statutory tort should allow individuals to seek redress for breaches of privacy not necessarily covered by the Act; and
- a plaintiff should be required to show, on the balance of probabilities (not necessarily to “prove” as is stated in the *Issues Paper*, given this will be a civil action) that a person in the position of the plaintiff would have a reasonable expectation of privacy in the circumstances.

With regards to the requirement for fault, we submit that a statutory tort should not be confined to intentional or reckless invasions of privacy but should also extend to negligent invasions of privacy. We provide more detailed feedback in response to the consultation questions below.

The need for effective privacy protection

Guidance from international law

The right to privacy is a civil liberty which belongs to the class of rights relating to individual autonomy. Like the right to liberty and bodily integrity, it therefore warrants zealous protection.² Effective privacy protection is also the natural corollary of protection against harm to reputation. Each derives from a common individual interest which recognises the inherent value in being free to live with dignity and without arbitrary interference. To protect against defamation without also protecting privacy leaves the most disadvantaged and often the most un reputable in our society inhibited in their enjoyment of both private and public life.

As the Issues Paper acknowledges, Victoria, the ACT and now Queensland have all passed human rights legislation which explicitly protects the right to privacy. All take their inspiration from Article 17 of the *International Covenant on Civil and Political Rights (ICCPR)* which stipulates that States should make provision to protect everyone against arbitrary or unlawful interference with privacy, family, home or correspondence, and grant access to an effective remedy against those responsible.³ In NSW, the *Privacy and Personal Information Protection Act 1998* (NSW) establishes information privacy principles which regulate the use, disclosure and retention or deletion of personal

² See the landmark principle from *Lindley v Rutter* [1981] QB 128: “It is the duty of the courts to be ever zealous to protect the personal freedom, privacy and dignity of all who live in these islands.”

³ CCPR 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, 32nd Session, Human Rights Committee, 8 April 1988.

information, but it does not establish a free-standing right to privacy comparable to these other state jurisdictions.

Human rights jurisprudence confirms that the right to privacy is internationally valued as critical to the functioning of a free society. In fact, various cases demonstrate that the right to privacy is quite broad. In *Toonen v Australia*, the Human Rights Committee confirmed that the right includes the right to engage in consensual sexual activity in private.⁴ In *Coeriel and Aurik v The Netherlands*, the right to privacy was said to include the right to freely express one's identity.⁵ In *Leo Hertzberg et al. v. Finland*, three members of the Committee even observed that Article 17 protects "the right to be different and live accordingly".⁶ Jurisprudence of the European Court of Human Rights supports this broad construction. In *Botta v Italy*, the Court found that privacy "includes a person's physical and psychological integrity...the development, without outside interference, of the personality of each individual in his relations with other human beings."⁷

A direct right of action

56. How should any direct right of action under the Act be framed so as to give individuals greater control over their personal information and provide additional incentive for APP entities to comply with their obligations while balancing the need to appropriately direct court resources?

Legal Aid NSW agrees with the recommendation of the *Digital Platforms Inquiry (DPI Report)* that individuals be given a direct right to bring actions and class actions against APP entities in court to seek compensatory damages as well as aggravated and exemplary damages for financial and non-financial harm suffered as a result of an interference with their privacy under the Act.⁸

We acknowledge that the Australian Government has supported this recommendation in principle, subject to "identify[ing] the appropriate measures that can be taken to ensure individuals have adequate remedies for an interference with their privacy under the Privacy Act".⁹

⁴ *Toonen v. Australia* U.N. HUMAN RIGHTS COMM., Communication No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (1994); See also, *Dergachev v. Belarus*, U.N. HUMAN RIGHTS COMM., Communication No. 721/1996, U.N. Doc. CCPR/C/74/D/721/1996 (2002) at ¶¶ 2.7, 2.8, 6.7. (describing invasive strip search of prisoner and the requirement that he apply for permission before writing to anyone as "attacks on [the author's] privacy and dignity", and finding resultant violation of Article 17).

⁵ *Coeriel et al. v. The Netherlands*, U.N. HUMAN RIGHTS COMM., Communication No. 453/1991 at ¶ 10.2, U.N. Doc. CCPR/C/52/D/453/1991 (1994); see also, U.N. Human Rights Comm., Communication No. 400/1990 at ¶ 10.4, U.N. Doc. CCPR/C/53/D/400/1990 (1995) (finding falsification of a baby's birth certificate resulting in a different legal identity constitutes a violation of Article 17).

⁶ *Hertzberg et al. v. Finland*, U.N. HUMAN RIGHTS COMM., Communication No. 61/1979, Appendix, U.N. Doc. CCPR/C/15/D/61/1979 (1982).

⁷ *Botta v Italy*, App. No. 21439/93, Reports of Judgments and Decisions, Eur. Ct. H.R., ¶ 32 (Feb. 24, 1998).

⁸ ACCC, *Digital Platforms Inquiry*, 473.

⁹ Department of the Treasury, *Regulating in the digital age: Government Response and Implementation Roadmap for the Digital Platforms Inquiry* (n 3) 18.

A right to complain first

The majority of Legal Aid NSW's clients are vulnerable and encounter multiple barriers to pursuing redress for breaches of privacy. To begin with, legal aid is not free and our client base generally lack the resources to pursue proceedings unrepresented. This is underpinned by a more general unwillingness to speak with lawyers about legal problems.¹⁰ It is now well understood that if left unresolved, civil law problems can have a significant impact on the lives of the most disadvantaged, often escalating into criminal matters.¹¹

The complexity of privacy law in Australia also makes it difficult for people to know and understand their rights. Clients are often confused and overwhelmed by the broadly similar but not identical concepts and definitions contained in state and federal law, and the different pathways to obtaining a legal remedy. In some instances, this can be a deterrent to our clients taking action at all.

Currently, the Act enables individuals to complain about an act or practice that interferes with their privacy (s36). The Information Commissioner has the power to investigate (s40) or conciliate (s40A) such complaints. However, any determination made by the Commissioner is not binding or conclusive between the parties (s52(1B)). Complainants have a limited right to seek to enforce a determination in the Federal Circuit or Federal Court (s55A) however this is plainly not tantamount to a direct right of action.

We support amending the Act to introduce a clearly delineated right of complaint in relation to breaches of the APP as a precursor to a statutory cause of action.

Access to Justice

A foundational aspect of the rule of law is that justice must be accessible to all. In recent years, the Federal Attorney-General's Department and a number of State governments have underscored the importance of access to justice issues.¹² Access to justice should therefore encompass more than the opportunity to have one's day in court, and complainants should have recourse to legal remedies which enable resolution without incurring high legal costs.

The importance of the Dispute Resolution Model

Legal Aid NSW has extensive experience advising disadvantaged and vulnerable clients about their legal problems including discrimination and human rights matters. In nearly all cases, a client's decision to pursue legal remedies will turn on whether they can access

¹⁰ According to the Law Foundation of NSW LAW Survey (2012), only 16% of people who have a legal issue seek legal advice.

¹¹ Productivity Commission, *Access to Justice Arrangements Report*, v1, p.24, 2014.

¹² See e.g. Australian Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, 2009, Report of the Access to Justice Taskforce; Australian Productivity Commission, *Access to Justice Inquiry Report*, 3 December 2014; Victoria State Government, *Access to Justice Review – Report and Recommendations*, August 2016, Department of Justice and Regulation.

timely, inexpensive and effective dispute resolution mechanisms, and without these may never be afforded the opportunity to pursue their legitimate legal disputes. Forums such as the Australian Human Rights Commission (**AHRC**) enable clients to ventilate their disputes early and reach a satisfactory outcome without the burden of litigation. By way of illustration, in 2019-20, only two percent (2%) of unlawful discrimination complaints finalised by the AHRC proceeded to court.¹³

Legal Aid NSW strongly supports dispute resolution models that require mediation or conciliation as a precondition for litigation; these forums enable more individuals to exercise their legal rights and seek appropriate remedies for their legitimate disputes. We submit that there should be an independent, no-cost 'conciliation model' available to complainants who do not wish to proceed to court. This would help to ensure the court's time and resources are not unduly burdened by small claims and the parties have an opportunity to resolve claims without incurring unnecessary legal costs.

The *Issues Paper* flags several potential approaches for the framing of a direct right of action under the current Act.¹⁴ Of these, we propose that individuals should have a right to:

- i) access a no-cost conciliation body capable of receiving and resolving privacy complaints (such as the OAIC); and
- ii) if their matter fails to resolve or if the person chooses, a right to commence a tortious claim in court.

This is similar to the consumer and finance sector, where individuals who suffer loss or damage due to a breach of the Consumer Data Rules can apply to either the Courts or to an independent, no-cost financial complaints body (the Australian Financial Complaints Authority).

We provide further detail below regarding the benefits that an action in tort provides, and complainants should have the choice of proceeding in this way if the severity of the breach, as well as on their own circumstances, merit it.

¹³ AHRC, 2014, 'Annual Report – 2013-14', 132

¹⁴ *Issues Paper*, pg 69.

Is a Statutory tort of privacy needed?

57. Is a statutory tort for invasion of privacy needed?
58. Should serious invasions of privacy be addressed through the criminal law or through a statutory tort?
59. What types of invasions of privacy should be covered by a statutory tort?
60. Should a statutory tort of privacy apply only to intentional, reckless invasions of privacy or should it also apply to breaches of privacy as a result of negligence or gross negligence?
61. How should a statutory tort for serious invasions of privacy be balanced with competing public interests?
62. If a statutory tort for the invasion of privacy was not enacted, what other changes could be made to existing laws to provide redress for serious invasions of privacy?

Relationships in which privacy breaches occur often involve power imbalances, such as the relationship between police officer and citizen, employer and employee, landlord and tenant, or social media entity and user. Clients to whom Legal Aid NSW provides advice about privacy are often at a further disadvantage because of their youth, cultural and linguistic background or economic circumstances. Our clients may decide not to lodge a complaint because they perceive the process to be too burdensome or lacking in accountability. Creating a statutory tort of privacy affords an opportunity to hold to account those who arbitrarily interfere with a person's privacy.

Case Study: Joan's Story

Joan is a woman in her forties who had a criminal history of supply of drugs but had no current charges on foot.

Joan was evicted from her home after police approached the building management and advised them that she had a criminal history. On the basis of this information, the building management complained to the landlord, who then terminated her tenancy on the alleged grounds of illegal use of the premises.

There was no evidence of any illegal use, but the building management and landlord evicted her nevertheless.

Consequently, Joan experienced various forms of financial hardship, including bearing the costs of moving, the loss of her bond which the landlord is withholding and the need to pay a new bond elsewhere.

Joan's mental health also suffered greatly from the hurt, humiliation and stigmatisation of being evicted when she was trying to get her life back on track.

Although her immediate priority is to secure stable housing and recoup some of her costs, Joan feels deeply aggrieved by the actions of Police in breaching her privacy.

She wants to take action for the economic and non-economic loss she has suffered, including the impact on her health, enjoyment of life and the physical inconvenience of the eviction.

The conduct of NSW Police Force (**NSWPF**) is not regulated by the *Privacy Act* and the NSWPF is also exempt from the Information Privacy Principles in NSW under the *Privacy and Personal Information Protection Act 1998* (NSW) (**PPIPA**) except in relation to administrative or educational functions.¹⁵ This leaves many people like Joan with no legal recourse. Legal Aid NSW regularly advises clients that even if police collect, disclose or misuse their personal information, they cannot avail themselves of any legal remedy for such conduct. This experience emphasises that a lack of adequate privacy protection can also have flow on effects in other areas of life, such as a person's right to stable housing. The risk of homelessness is relatively high when police may divulge personal information about certain tenants to landlords. We consider such conduct should fall into the category of seriousness contemplated by the Issues Paper.

Legal Aid NSW therefore supports the recommendations of both the DPI as well as the ALRC that a statutory cause of action for invasions of privacy be introduced in Australia.¹⁶

Reasons for an Express Civil Right of Action

The *Issues Paper* states that:

¹⁵ Section 27, PPIPA.

¹⁶ ALRC, *Serious Invasions of Privacy in the Digital Era* (n 229) 59.

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- In 2016, reports of the New South Wales Standing Committee on Law and Justice and the South Australian Law Reform Institute (SALRI) noted that the existing privacy framework provided inadequate protection to people who suffer serious invasions of privacy;¹⁷ and
 - since the publishing of those reports, “there have been significant developments in the criminal law with respect to some serious invasions of privacy”.¹⁸

The *Issues Paper* goes on to note that “the development of criminal laws that specifically concern serious breaches of privacy...may negate the need for a tort of privacy on a policy basis”.¹⁹ However, Legal Aid NSW considers that criminal laws do not negate the need for a civil cause of action.

Developing a robust privacy protection regime

Various areas of law point to the importance of having both criminal and civil law sanctions in order to entrench normative standards. In the field of anti-discrimination law, for instance, most jurisdictions in Australia have laws which punish serious vilification or incitement to violence as well as establishing a right to claim damages for the same or similar conduct.²⁰

Other jurisdictions offer insight into how a civil right of action may contribute to the development of robust privacy protections even as society’s information management needs evolve. For example, the right to privacy has been protected in Victoria since 2006 under the *Charter of Human Rights and Responsibilities Act*. Notably, in response to Victorian Government review of that Act in 2011, the Office of the Victorian Privacy Commissioner remarked that the protection of privacy has “led to a significant increase in the number of public sector organisations seeking to consult with the Privacy Commissioner when developing legislative proposals and drafting legislation”.²¹ We submit that creating a civil right of action would also likely encourage public sector agencies to carefully consult before introducing laws which may trammel privacy rights.

A civil right of action may also have a strong deterrent effect on public sector and other organisations who may otherwise give scant attention to routine practices. In addition, a reliance on criminal laws to punish breaches of privacy will not assist individuals whose privacy has been breached by law enforcement agencies themselves.

¹⁷ Standing Committee on Law and Justice, Remedies for the Serious Invasion of Privacy in New South Wales (n 363) 57; South Australian Law Reform Institute, A statutory tort for invasion of privacy (n 363) 15.

¹⁸ *Issues Paper*, pg 71.

¹⁹ *Ibid*, pg 71.

²⁰ For example, see s11.4 and s80.2(1) of the *Criminal Code Act 1995* (Cth) and s18C of the *Racial Discrimination Act 1975* (Cth); s93Z *Crimes Act 1900* (NSW) and s20C *Anti-Discrimination Act 1977* (NSW); s24 *Racial and Religious Tolerance Act 2001* (Vic); s4 *Racial Vilification Act 1996* (SA); s131A *Anti-Discrimination Act 1991* (Qld); s77 *Criminal Code Act Compilation Act 1913* (WA).

²¹ Review of the Charter of Human Rights and Responsibilities Act 2006, Government of Victoria, accessed at https://www.parliament.vic.gov.au/images/stories/committees/sarc/charter_review/report_response/20110914_sarc.charterreviewreport.pdf.

Case Study: Dane's Story

Dane is a legal aid client who was convicted and sentenced for federal offences committed when he was under 18 years old.

The *Children (Criminal Proceedings) Act 1987* (NSW) (**the CCPA**) makes it an offence to publish or broadcast the name of a person in a way that connects them with criminal proceedings if the proceedings relate to the person and the person was a child when the relevant offence was committed. The penalty for a single breach is 12 months imprisonment or a \$55,000 fine for a corporation.

The day after Dane's sentencing, the Australian Federal Police (**AFP**) published a media release about the outcome of the hearing which named and identified him as a defendant.

Legal Aid NSW wrote to the AFP to request that they remove our client's name from its media release on the basis that the publication was in breach of the Act. The AFP agreed to do so, however, in the meantime, the original media release was picked up and published by multiple media outlets in Australia and overseas.

We estimate that over 40 different publications ran a story based on the release which featured Dane's full name. In particular, one conglomerate media company syndicated and published the story in 35 different newspapers.

Legal Aid NSW wrote to all known publishers to demand withdrawal or amendment of the offending publications. However, even after most of the publications had been removed or amended, Google continued to show cached search results, featuring Dane's name, which required separate removal.

Dane was deeply concerned about this breach of the CCPA and his right to anonymity and pseudonymity (under APP 2, *Privacy Act*), particularly in circumstances where he had given evidence against a co-accused in relation to a crime syndicate. There was a real possibility of life-threatening harm given his past criminal associations.

Unfortunately, Dane had no civil remedy under state or federal law: the CCPA confers no private right of action; the PPIPA does not apply to the AFP, and neither the NSW Information Commissioner nor the NSW Civil and Administrative Tribunal (NCAT) have jurisdiction to adjudicate conduct by the AFP. Furthermore, complaint under the *Privacy Act* was also unavailable due to multiple, broad exemptions which applied to the AFP as both an APP entity and enforcement body.

Legal Aid NSW is aware of another case in which NSW Police used a Police District Facebook page to target and identify an Aboriginal minor living in a small coastal town. In our experience, these incidents are not isolated. Police frequently use social media such as Facebook to publicise their investigations and recent arrests, in our view, with minimal regard for whether such publications comply with their obligations under the CCPA or balance the rights of the individual.

Breaches of privacy are also becoming increasingly common in the course of routine police work. In NSW, police use proactive policing strategies such as frequent stop and

searches or the Suspect Target Management Plan (STMP) to identify and target individuals who they perceive to be at risk of offending behaviour. Once an individual is temporarily detained, police routinely request possession of or confiscate the person's mobile phone while purporting to exercise their search powers under the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (LEPRA). Section 21 of that Act allows police to search persons and seize and detain things without a warrant. Sections 27 and 28A enables a search to take place after lawful arrest.

Case Study: Ruby's Story

Ruby was standing outside a police station waiting for her girlfriend at midday. At the time, she was 20 years old. While she was waiting, she was on the phone to her sister. A female and male officer approached her and said "*Why are you taking a video of the police station?*"

Ruby denied that she was filming the station or any of the officers. The female officer then demanded the phone. When Ruby declined, the male officer came up behind her and said "*You better give her the phone or you'll get charged and locked up.*" She then offered to show the phone to the officers but asked them not to touch it.

The female officer then grabbed the phone out of Ruby's hands and began going through all her photos and text messages. Police asked her various questions about texts between her friend and a family member which Ruby was unable to answer.

After asking Ruby for ID, the officers searched her in front of the station.

Ruby felt upset and humiliated that police went through all her messages and photos and searched her in public during the day.

Mobile phones contain a vast variety and volume of data. In Legal Aid NSW's view, police conduct in the Case Study above raises genuine privacy concerns, especially for young people and Aboriginal people who, in the experience of our solicitors, are overwhelmingly the target of such proactive policing strategies. The United States Supreme Court has commented on this practice in *Riley v California*, rejecting the assertion that searching data stored on a cell phone is the same as searching physical items like a wallet or purse.²²

We contend that the reasoning in *Riley* applies equally to the Australian context, albeit that the laws in question are different. An explicit civil right of action will help to ensure that any agency or body operates within defined parameters under the law.

²² 134 S. Ct. 2473 (2014). The full quote is: "The United States [respondent] asserts that a search of all data stored on a cell phone is 'materially indistinguishable' from searches of these sorts of physical items. That is like saying a ride on horseback is materially indistinguishable from a flight to the moon. Both are ways of getting from point A to point B, but little else justifies lumping them together. Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette packet, a wallet, or a purse. A conclusion that inspecting the contents of an arrestee's pockets works no substantial additional intrusion on privacy beyond the arrest itself may make sense as applied to physical items, but any extension of that reasoning to digital data has to rest on its own bottom."

Dane's experience is indicative of the need for such deterrence. As the *Issues Paper* notes, the limited functionality of the OAIC complaints process, and the limited circumstances in which these matters can proceed to court, can result in a lack of care by large public agencies and private companies. In the absence of civil litigation, the perceived consequences for a breach of privacy are relatively minimal.

If the Commonwealth was to enact an express tort for breach of privacy, public and private agencies may be required to implement better safeguards and standards more in keeping with community expectations.

The Principle of Compensation

The *Issues Paper* notes the following with respect to complaints that individuals can currently make to the Office of the Australian Information Commissioner (OAIC):

*The Commissioner has power to investigate, conciliate and decline complaints. The Commissioner may make a determination after investigating a complaint... including that the complainant is entitled to a specified amount by way of compensation for loss or damage [emphasis added].*²³

Although the word "compensation" is used in both the Act as well as on the website of the OAIC,²⁴ Legal Aid NSW considers that the form of financial remedy offered under the OAIC complaints function at present does not actually represent 'compensation' in its usual form. It is well established in common law that the purpose of compensation is to put the claimant back in the position, so far as is possible, that they would have been in had the tort not been committed.

This approach is reflected through the many heads of damage which can be awarded through the common law courts for current torts. For example, in personal injury matters, it is not only pain and suffering that is compensated for, but a specific figure intended to represent the severity of the particular injury which forms the substance of the claim, as well as figures representative of past economic loss, future economic loss and out of pocket expenses (past and future) that the claimant has incurred as a result of the wrongful act.

Legal Aid NSW submits that these heads of damage are appropriate for breaches of privacy too, and that only the implementation of a tort for breach of privacy would allow this to properly occur.

Assessing Quantum

Part V of the Act sets out the processes available to the Commissioner in resolving privacy complaints. Section 52 of the Act empowers the Commissioner to make a declaration that the complainant is entitled to a specified amount by way of compensation. A privacy complaint brought to the Commissioner is actionable *per se*, in the sense that the complainant need not prove any 'actual damage'. However, Legal Aid NSW acknowledges that there is relatively little principled guidance available when assessing quantum in privacy disputes.

²³ Issues Paper, pg 67.

²⁴ <https://www.oaic.gov.au/privacy/privacy-complaints/how-we-investigate-and-resolve-your-complaint/#possibleOutcomes>

Case Study: David's Story

David was notified by a Government Department (**the Department**) that there had been an instance of unauthorised access to his personal information. The Department refused to provide specific information as to the contents of the breach, as well as the specific entity that accessed the information.

David suffers from a number of serious mental health conditions, including PTSD and anxiety. The unauthorised access of his information by an unknown entity and the Department's lack of transparency caused him significant pain and suffering; he felt mistrustful and as if his complaint was not being taken seriously.

David also suffered economically. The nature of the breach made him feel he could no longer use that government service and this impacted his employment prospects. As a result, he felt compelled to spend several thousand dollars on a computer so that he could apply for jobs himself. He also spent several months unsuccessfully looking for employment.

Our client's only option under the current law was to negotiate with the Department directly, and then to consider a complaint to the Office of the Australian Information Commissioner (**OAIC**). While he did receive a small settlement offer, the amount he received through the process did not reflect his real loss, and he felt as if there was a stark power imbalance in negotiations.

In the above case, the Claimant suffered real economic loss as a direct result of a breach of his privacy, in that he was unable to work for three months because of the nature of the breach. In addition, he was forced to spend several thousands of dollars in out of pocket expenses, and his mental health conditions were exacerbated.

Through an action in tort, the Claimant could have been potentially compensated for all of these losses. Unfortunately, under the current provisions, a principled and forensic method of compensating loss is not possible.

We **enclose** with this submission a table which summarises the damages awarded for privacy complaints to the OAIC between 2016 to 2019 (**Annexure A**). The range of damages awarded by the Commissioner ranged from \$1,000 - \$20,000. At the lower end, damages were awarded as "compensation" for non-economic loss such as stress, injury to feelings, humiliation and reputational damage. The table shows that more substantial damages may be awarded where the complainant has suffered economic loss flowing from the breach, but critically, there is no real nexus between the actual economic loss suffered and the award of damages which is granted. This is because, unlike a cause of action in tort where damages must be particularised in a statement of claim and/or statement of particulars, the current complaints process does not require (or encourage) this approach. Decisions, therefore, are much more discretionary and unpredictable than those made in court. Put another way, the level of economic loss is only 'taken into account', rather than precisely calculated as a part of the award. The result of this, in

general, is an unpredictable and unprincipled system which offers much lower awards of damages than would be offered to claimants in court.

Development of Precedent

One of the primary benefits of a statutory tort for breach of privacy will be the development of precedent over time, and the certainty and consistency that this will provide, including in relation to quantum.

Currently, for individuals who think that their privacy has been breached and who want to take action, there is scant judicial guidance available. The OAIC website lists all of the privacy determinations that have been made under s52 of the Act since 1 November 2010.²⁵ There are 40 determinations listed and published, but the lack of specificity in the current Act as to what can be claimed and how those claims can be framed means that awards can vary wildly for reasons which are difficult to identify.

For this reason, proceeding with a complaint to the OAIC involves considerable uncertainty regarding the outcome, and for a vulnerable client, that may be enough to deter them from pursuing their claim.

The implementation of a separate statutory cause of action will ensure the development of precedent, which in turn will provide certainty for potential plaintiffs about whether they have prospects of success in bringing forward a claim, and what specific remedy the court may be likely to provide. It will also engage the judiciary in their function of monitoring and interpreting what is sure to be an increasingly important area of law.

How the tort should be framed

Legal Aid NSW agrees with many of the recommendations of the ALRC with respect to how a tort for beach of privacy should be framed. Specifically, we agree that:

- a statutory tort should allow individuals to seek redress for breaches of privacy not necessarily covered by the Act; and
- a plaintiff should only be required to establish, on the balance of probabilities, that a person in the position of the plaintiff would have a reasonable expectation of privacy in the circumstances.

With regards to the requirement for fault, we disagree that a statutory tort should be confined to intentional or reckless invasions of privacy and should not extend to negligent invasions of privacy. Our Case Studies exemplify something more akin to gross negligence than recklessness, in that it could easily be said that the agencies involved failed to exercise reasonable care and diligence in relation to a reasonably foreseeable risk. These breaches can still be, and are, very serious, and can cause a significant degree of harm, and plaintiffs in these situations should be able to make a claim in tort for the damage suffered. A properly construed test will ensure that vexatious or trivial claims would nonetheless remain outside of the scope of this cause of action.

²⁵ <https://www.oaic.gov.au/privacy/privacy-decisions/privacy-determinations/?showAll=1>.

Annexures

Annexure A

Complaint:	Type of information improperly accessed:	Non-economic loss:	Economic loss:	Other aggravating factors:	Damages awarded:
'PB' and United Super Pty Ltd as Trustee for Cbus (Privacy) [2018] AICmr 51	The Complainants' full name; Complainants' date of birth; Complainants' superannuation member number; Complainants' most recent employer superannuation contributions; and Complainants' duration of employment. AND In the case of some of the Complainants, the emails also identified any voluntary contributions and employee salary-sacrifice contributions made by those members	Nil. The Respondent's safeguards in place to protect the security of members' personal information were found to be reasonable in the circumstances. The Commissioner also declined to make an award for damages for non-economic loss. While acknowledging there may have been 'hurt feelings' upon becoming aware of the breach, the Commissioner decided that, in the circumstances of the matter, <i>"the most appropriate form of redress is... a public apology that explains the circumstances of breach and what systems [the Respondent] has in place to minimise the risk of the breach recurring"</i>	Nil.	Nil.	Nil.

Complaint:	Type of information improperly accessed:	Non-economic loss:	Economic loss:	Other aggravating factors:	Damages awarded:
'LS' and 'LT' (Privacy) [2017] AICmr 60 (26 June 2017)	Failure of psychologist to provide access to own personal information being: Clinical notes for the respondent's treatment of the complainant and Hospital records for the complainant's inpatient treatment.	Pressure from frustrating process.	Nil.	Nil.	\$1,000
'LP' and The Westin Sydney (Privacy) [2017] AICmr 53 (7 June 2017)	Complainant unaware phone call with hotel recorded. Personal information not sensitive information disclosed.	Nil.	Nil.	Nil.	\$1,500
'RC' and TICA Default Tenancy Control Pty Ltd (Privacy) [2019] AICmr60	The names of the parties to a proceeding in the NSW Civil and Administrative Tribunal ('NCAT') being the Complainant and the NSW Land and Housing Corporation; the number of that proceeding; the hearing date of that proceeding; the venue for that proceeding.	Distress, inconvenience, disadvantaged when discussing the situation with real estate agent	Nil.	Accessed by two real estate agents on two separate occasions.	\$1,500

Complaint:	Type of information improperly accessed:	Non-economic loss:	Economic loss:	Other aggravating factors:	Damages awarded:
'QF' & Others and Spotless Group Limited (Privacy) [2019] AICmr 20	Lists of names of casual employees of Cleanevent being provided by Cleanevent to the AWU; union membership payments made	Anger, outrage, justice and betrayal after years of long service with the company. Stress and anxiety.	Nil.	Took place in the context of a relationship built on confidence and trust. Employer's indifference towards privacy obligations was an additional sense of hurt.	-\$39,000 – made up of \$4,500 for each of the 6 Complainants who were not an AWU member at the time of the disclosures AND \$1,500 for each of the 8 Complainants who were already a substantive AWU member at the time of the disclosures; and -\$21,000 as aggravated damages – being \$1,500 for each Complainant.
'JO' and Comcare [2016] AICmr 64	Name; postal address; email address; workplace injury details to former employer; claim status.	Nil. (Noted availability of damages even though highly unlikely defence department would misuse info)	Nil.	Nil.	\$3,000

Complaint:	Type of information improperly accessed:	Non-economic loss:	Economic loss:	Other aggravating factors:	Damages awarded:
<i>'Y' and Business Service Brokers Pty Ltd t/a TeleChoice [2016] AICmr 44</i>	Medicare card, drivers licence, telecommunication s contract signed by the complainant	Nil. (Nb that Telechoice immediately made a voluntary data breach notification to OAIC and offered an undertaking to address the incident)	Nil.	Records left in an open shipping container, found by journalist	\$3,500
<i>'LU' and Department of Defence (Privacy) [2017] AICmr 61</i>	Complainant's name, postal address and date of birth; Complainant 's Personnel Management Key Solution (PMKeyS) number, a unique employee number allocated to Defence personnel, which provides access to phone number and personal email address information; and Complainant's health information	Psychiatric assessments showing mental distress.	Expenses reasonably incurred in investigating the complaint .	Respondent's audit log recorded that five (5) individuals had accessed the redacted Comcare Report during the one year period that it had been available in a general folder of the Respondent's defence records management system and that four of them were in key executive roles within the Complainant's Division and the fifth was the employee who had raised the concerns about the alleged cancer cluster.	\$10,000 (non-economic) \$3,000 (economic reimbursement)

Complaint:	Type of information improperly accessed:	Non-economic loss:	Economic loss:	Other aggravating factors:	Damages awarded:
'KB' and Veda Advantage Information Services and Solutions Ltd [2016] AICmr 81	Credit information of a person who was not the complainant was included on the complainant's credit report (including details of a judgment debt of \$7,000)	Stress.	This impacted on the complainant's ability to conduct business as per usual, because his credit cards were blocked as a result and suppliers would not supply goods to him for his business until they received payment from him	Nil.	-\$10,000 for non-economic loss - \$5,830 for expenses reasonably incurred
'QP' and the Commonwealth Bank of Australia Limited (Privacy) [2019] AICmr48	The Complainant's credit history with the Respondent; Repayment status of Complainant's credit card with the Respondent which were recorded inaccurately.	Resulting and ongoing stress and 'shame' of being denied a home loan 6 times due to inaccurate recording of credit history.	Nil	Nil.	\$15,000 (non-economic loss)
'LB' and Comcare (Privacy) [2017] AICmr 28	[Determination not available]	-	-	-	\$20,000 for non-economic loss \$3,000 for expenses

Complaint:	Type of information improperly accessed:	Non-economic loss:	Economic loss:	Other aggravating factors:	Damages awarded:
					reasonably incurred