1 December 2015

Committee Members
Standing Committee on Law and Justice
Parliament of New South Wales
By email: Law@parliament.nsw.gov.au

Dear Committee Members,

Inquiry into remedies for the serious invasion of privacy in NSW

Thank you for the opportunity to give evidence to the Committee in relation to the above inquiry on Monday, 16 November 2015. The Public Interest Advocacy Centre (**PIAC**) welcomes this inquiry as an important step towards improving the protection of privacy in NSW.

During the course of our evidence we took two questions on notice. The first relates to the availability of interlocutory relief for breach of privacy; the second relates to class actions and rules of standing. Our responses are below.

Interlocutory relief for breaches of privacy

The Committee asked PIAC whether it had any views regarding how to provide remedies for breach of privacy at an interlocutory stage, having particular regard to: restrictions on publication, whether or not existing jurisprudence on the granting of interlocutory relief should be adjusted and whether existing procedures for accessing interlocutory relief are adequate to address the various factors arising from a privacy claim.

Breaching an individual's privacy often causes irreparable damage. The availability of interlocutory relief, in the form of an injunction to prevent publication or distribution of private information, or an order to bring its publication to an immediate end, is accordingly necessary and appropriate. However, while PIAC supports the availability of an interlocutory remedy to prevent a threatened breach of privacy or to immediately address a breach, it is wary of making such relief too easily accessible.

Interlocutory remedies are likely to be sought in urgent circumstances and, as overseas jurisdictions have shown in the context of privacy, are more likely than not to be sought against media organisations, including both web-based hosts and broadcast and print media. The Australian Law Reform Commission (**ALRC**), when considering whether to recommend the availability of interlocutory injunctions for potential breach of privacy, noted

> of all remedies, an interlocutory injunction restraining publication is arguably the most significant restriction on freedom of speech and the freedom of the media to report on matters of public interest and concern. There is therefore a strong and

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> justifiable concern that unmeritorious claims to prevent the disclosure of allegedly 'private' information, in which there is a legitimate public interest, might chill freedom of speech and the freedom of the press.[1]

Similarly, PIAC emphasises that it is important that the right balance be struck between protecting an individual's privacy and the right to freedom of expression embodied in a free press.

One way to mitigate the risk of a chilling effect would be to provide, in any proposed legislation, for specific protection for free speech at an interlocutory stage. Rather than leaving the balancing exercise solely to judicial development within the current rules governing the applicability and availability of interlocutory remedies, PIAC sees merit in requiring a court to consider freedom of expression in interlocutory proceedings for breach of privacy. This accords with the recommendations made by the ALRC that any statutory cause of action should provide for an interlocutory remedy 'to restrain the threatened or apprehended invasion of privacy' and that when considering whether to grant injunctive relief 'a court must have particular regard to freedom of expression and any other matters of public interest'.[2]

Mandating consideration of the public interest in free expression should provide clarity and certainty for both claimants and respondents. It should also mitigate the risks that have emerged in comparative jurisdictions. The development of so-called 'super-injunctions' in the context of the development of the law of privacy in the United Kingdom prevent, for example, not only publication of the impugned material but the fact that an injunction exists, and this has led to a perception that the media were being unduly and unfairly silenced.[3]

Allowing for such specific protection for freedom of expression in statute is not without precedent. Section 12(3) of the *Human Rights Act 1998* (UK), for example, provides that a court must have particular regard to the importance of the right to freedom of expression and the extent to which publication of the material in question would, among other things, be 'in the public interest'. The purpose of the provision was to set a high threshold for the grant of interlocutory injunctions against a media respondent.[4] Lord Nicholls in *Cream Holdings Limited v Banerjee*[5] considered the effect of s 12(3) to be that a court will not make an interim order without being satisfied that the applicant's prospects of success at the trial are sufficient to justify the making of the interim order.[6] The significance of s 12(3) lies in it setting 'a higher bar than the general law in relation to granting an interim injunction'.[7]

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

2 Recommendations 12-7 and 12-8, above, note 1.

3 See, for example, the report of the Joint Committee on Privacy and Injunctions for its inquiry *Privacy and Injunctions* (12 March 2012), HL Paper 273, HC 1443, available at http://www.publications.parliament.uk/pa/jt201012/jtselect/jtprivinj/273/273.pdf.

4 See the comments of Lord Nicholls in *Cream Holdings Limited v Banerjee* [2004] UKHL 44, at para 15.

5 [2004] UKHL 44.

6 Above, note 5, at para 2.22.

7 As noted by the Rt Hon Lord Justice Leveson *The Leveson Report: An inquiry into the culture, practices and ethics of the press, Report* (November 2012), at page 1851 (Appendix 4), available at http://webarchive.nationalarchives.gov.uk/20140122145147/http://www.official-documents.gov.uk/document/hc1213/hc07/0780/0780_i.pdf Note, however, the views that have been expressed, including by Leveson, that s 12 has not led to freedom of expression being held paramount in interim proceedings, noting that 'The role of s 12 is predominantly to establish a test for granting interim relief that differs from the conventional balance of convenience that is considered in civil proceedings, but otherwise adds little to the substantive law' in relation to the right to freedom of expression protected by the HRA.

To keep the remedy within reach of all potential victims of privacy violation, and not only those with significant financial resources, the onus should be on the respondent to show that it is in the public interest for the information to be published or distributed in order for the court to reject an application for an injunction.

Enabling systemic litigation

The Committee asked whether the existing provisions for class actions in the NSW Supreme Court and Federal Court would be sufficient to provide for a class action for privacy.

As a public interest legal practice seeking to promote human rights, PIAC strongly supports a low threshold for commencing class actions, as well as an expansive approach to the question of legal standing. The benefit of enabling this type of test case litigation is that it has the capacity to create systemic change for large groups of people without the need for an individual to bear the burden and risk of litigation.

Broadly speaking, in PIAC's experience the rules governing representative proceedings in the NSW Supreme Court under Part 10 of the *Civil Procedure Act 2005* (NSW) (**CPA**) and in the Federal Court under Part IVA of the *Federal Court of Australia Act 1976* (Cth) enable class actions to be run effectively. PIAC, for example, recently settled a class action where it successfully represented a number of young people who claimed to have been unlawfully detained by the NSW Police as a result of out-of-date or incorrect information held on the police database. The impact of the class action has been significant for the individuals involved, but also drew attention to the wider systemic issues that needed to be addressed.

A related, but separate, issue is the question of legal standing, concerning who will be permitted to bring an action for breach of privacy where a large number of people are directly impacted by one act or an ongoing systemic problem.

PIAC recommends that public interest organisations be enabled, in any legislation enacting a statutory cause of action for breach of privacy, to bring representative actions on behalf of an aggrieved group of people who are similarly affected by a particular privacy violation. The current inability to do so in most areas of public interest law greatly undermines the ability of organisations like PIAC to achieve systemic change and is a significant deterrent to individuals facing the enormous risk associated with litigation that has the potential to benefit many.

An example of problematic rules of standing can be found in the federal discrimination jurisdiction, where there is inconsistency for applicants lodging a complaint to the Australian Human Rights Commission (**AHRC**) and a complaint to the relevant federal courts. Complaints to the AHRC can be made by or on behalf of a 'person aggrieved' (s 46P(2) *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**)). However, only an 'affected person' (s 46PO(1) AHRC Act) can bring proceedings in the courts if the complaint does not resolve at conciliation. This means that an organisation, such as a disability advocacy organisation, can bring a complaint on behalf of an individual to the AHRC, but if the matter does not settle then only the individual with the disability can bring the complaint to court, as only the individual is an 'affected person'. This means that an individual must take on the enormous risk in taking civil action to address discrimination that may affect hundreds of people in a similar position.

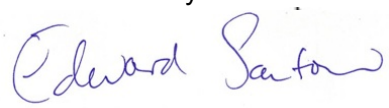
PIAC accordingly recommends a liberal approach to the question of standing be adopted and, more specifically, that open standing be permitted. A good example of such a provision is s 123 of the *Environmental Planning and Assessment Act 1979* (NSW), which provides:

(1) any person may bring proceedings…for an order to remedy or restrain a breach of this Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach;
(2) proceedings under this section may be brought by a person on his or her own behalf or on behalf of himself or herself and on behalf of other persons (with their consent), or a body corporate or unincorporated…having like or common interests in those proceedings.

Finally, in addition to rules of standing, there are other hurdles to public interest litigation that could be addressed to ensure that remedies for breach of privacy can be made available to everybody, particularly those who are disadvantaged and marginalised. For example, a significant impediment to accessing justice for many people seeking to enforce their legal rights is the risk of an adverse costs order as a result of unsuccessful litigation. In PIAC's experience, even where pro bono legal representation or representation on a conditional fee basis is secured, many meritorious cases do not proceed due to the risk of an adverse costs order. This is especially the case in matters where there is great disparity in resources between the applicant and respondent. Accordingly, the availability of a protective costs order for breach of privacy would ensure justice can be accessed by individuals seeking to protect their privacy or damages where it has been breached.

We hope this further information is of assistance to the Committee. Should you require any further details or information please contact us.

Yours sincerely



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