

Standing Committee on Law and Justice

Remedies for the serious invasion of privacy in New South Wales

Ordered to be printed 3 March 2016 according to Standing
Order 231

New South Wales Parliamentary Library cataloguing-in-publication data:

New South Wales. Parliament. Legislative Council. Standing Committee on Law and Justice.

Remedies for the serious invasion of privacy in New South Wales / Standing Committee on Law and Justice. [Sydney, N.S.W.] : the Committee, 2016. – [xii, 63] pages ; 30 cm. (Report ; no. 57)

Chair: Natasha Maclaren-Jones, MLC.

“March 2016”.

ISBN 9781922258137

1. New South Wales. Parliament. Legislative Council. Standing Committee on Law and Justice.
2. Law—New South Wales.
3. Privacy, Right of—New South Wales.
 - I. Title
 - II. Maclaren-Jones, Natasha.
 - III. Series: New South Wales. Parliament. Legislative Council. Standing Committee on Law and Justice. Report ; no. 57

342.9440858 (DDC22)

How to contact the committee

Members of the Standing Committee on Law and Justice can be contacted through the committee secretariat. Written correspondence and enquiries should be directed to:

The Director

Standing Committee on Law and Justice

Legislative Council

Parliament House, Macquarie Street

Sydney New South Wales 2000

Internet www.parliament.nsw.gov.au

Email lawandjustice@parliament.nsw.gov.au

Telephone 02 9230 3528

Facsimile 02 9230 2891

Terms of reference

1. That the Standing Committee on Law and Justice inquire into and report on remedies for the serious invasion of privacy in New South Wales, and in particular:
 - (a) the adequacy of existing remedies for serious invasions of privacy, including the equitable action of breach of confidence
 - (b) whether a statutory cause of action for serious invasions of privacy should be introduced, and
 - (c) any other related matter.

These terms of reference were referred to the committee by the House on 24 June 2015.

Committee membership

The Hon Natasha Maclaren-Jones MLC	Liberal Party	<i>Chair</i>
The Hon Lynda Voltz MLC	Australian Labor Party	<i>Deputy Chair</i>
The Hon David Clarke MLC	Liberal Party	
The Hon Daniel Mookhey MLC	Australian Labor Party	
Mr David Shoebridge MLC	The Greens	
The Hon Bronnie Taylor MLC	The Nationals	

Table of contents

	Chair's foreword	9
	Summary of recommendations	10
Chapter 1	Introduction	13
	Background to the inquiry	13
	Conduct of the inquiry	14
	Submissions	14
	Public hearings	14
	Structure of the report	15
Chapter 2	Types of privacy invasions	17
	The concept of privacy	17
	'Revenge pornography' and other technology-facilitated abuse	19
	Other forms of surveillance or information capture	22
	'Big data' breaches	25
Chapter 3	Current protections and remedies	29
	Privacy legislation	29
	Privacy and Personal Information Protection Act (NSW)	29
	Health Records and Information Privacy Act (NSW)	32
	The role of the NSW Privacy Commissioner	32
	Privacy Act 1988 (Cth)	33
	Criminal legislation	34
	Surveillance legislation	38
	Common law actions and remedies	41
	Equitable action of breach of confidence	42
	Approaches in other jurisdictions	47
	United Kingdom	47
	New Zealand	49
	Canada	50
	Revenge pornography offences	51

Chapter 4	A statutory cause of action for serious invasions of privacy	55
	The need for a statutory cause of action	55
	Models for a statutory cause of action	58
	Scope	58
	Nature of the cause of action	59
	Fault element	60
	'Reasonable expectation of privacy'	63
	Seriousness	64
	Proof of damage	64
	National uniformity	65
	Forums	66
	Defences and exemptions	67
	Legislative action	68
Appendix 1	Submission list	73
Appendix 2	Witnesses	75
Appendix 3	Tabled documents	77
Appendix 4	Answers to questions on notice	78
Appendix 5	Minutes	79

Cases

Case study – Witness A	20
Case study – <i>Wilson v Ferguson</i> [2015] WASC 15	44

Chair's foreword

This inquiry was established to consider the adequacy of remedies to serious invasions of privacy amidst increasing community concern about the use of technology, including social media and surveillance technology, in ways which intrude upon and negatively impact people's day-to-day lives. Of particular concern in the lead up to the inquiry was the so-called 'revenge pornography' phenomenon, involving the distribution or threatened distribution of intimate images without the subject's consent.

The inquiry followed a number of reports from distinguished legal bodies, including the Australian and NSW Law Reform Commissions, both of which supported the introduction of a statutory cause of action that would enable a person to sue for a serious invasion of privacy.

The committee heard evidence from individuals, academics, legal experts, media and arts representatives, as well as from privacy experts including the NSW Privacy Commissioner, with the vast majority of stakeholders arguing strongly for the introduction of a statutory cause of action on the basis that existing legal remedies were inadequate. The bulk of evidence was that the available civil remedies, in particular the equitable action for breach of confidence, was inaccessible, offered a 'poor fit', and failed to offer appropriate remedy to people who suffered a serious invasion of privacy.

Stakeholders expressed frustration at the lack of decisive action on this issue, despite several eminent reports recommending a similar course.

Privacy is an asset. Once it is lost, it cannot be recovered. The impacts of that loss can be devastating. The committee agrees that there is a clear need to ensure better protection of privacy, and to provide adequate remedies to people who experience a serious invasion of privacy. To that end, the committee has recommended that the NSW Government introduce a statutory cause of action for serious invasions of privacy, based on the model proposed by the Australian Law Reform Commission in its 2014 report *Serious Invasions of Privacy in the Digital Era*.

On behalf of the committee, I would like to thank all the participants in this inquiry, including those who shared their personal experiences of the impact that serious invasions of privacy have had on their lives.

I also express my gratitude to my committee colleagues for their considered contributions to this inquiry, and to the secretariat for their professional support.

I commend the report to the Government.



The Hon Natasha Maclaren-Jones MLC
Committee Chair

Summary of recommendations

- Recommendation 1** **40**
That the NSW Police Force:
- a) ensure that its officers receive training in the harms associated with technology-facilitated stalking, abuse and harassment; and
 - b) that the training incorporate education about how existing offences and other orders, such as apprehended violence orders, could be used in respect of allegations of that nature.
- Recommendation 2** **40**
That the NSW Government undertake a statutory review of the *Crimes (Domestic and Personal Violence) Act 2007* to consider additional potential remedies available to the Local Court to protect the privacy of individuals who have been or are seeking to be safeguarded by apprehended domestic violence orders.
- Recommendation 3** **57**
That the NSW Government introduce a statutory cause of action for serious invasions of privacy.
- Recommendation 4** **71**
That in establishing the statutory cause of action at recommendation 3, the NSW Government base the action on the Australian Law Reform Commission model, detailed in its 2014 report, *Serious Invasions of Privacy in the Digital Era*.
- Recommendation 5** **71**
That in establishing the statutory cause of action at recommendation 3, the NSW Government should consider incorporating a fault element of intent, recklessness and negligence for governments and corporations, and a fault element of intent and recklessness for natural persons.
- Recommendation 6** **72**
That the NSW Government:
- a) broaden the scope of the NSW Privacy Commissioner's jurisdiction to enable the Commissioner to hear complaints between individuals relating to alleged serious invasions of privacy;
 - b) empower the NSW Privacy Commissioner to make determinations that involve non-financial forms of redress, including apologies, take down orders and cease and desist orders
 - c) ensure that the NSW Privacy Commissioner is empowered to refer a complaint on behalf of a complainant to the NSW Civil and Administrative Tribunal for hearing for a statutory cause of action where there is a failure to act on a non-financial form of redress, including apologies, take down orders and cease and desist orders, and
 - d) ensure that the Office of the NSW Privacy Commissioner is adequately resourced to enable it to fulfil its functions arising from the expanded scope to deal with complaints arising from alleged serious invasions of privacy.

Recommendation 7

72

That the NSW Government confer jurisdiction on the NSW Civil and Administrative Tribunal to enable it to hear claims (in addition to ordinary civil courts) arising out of the statutory cause of action for serious invasions of privacy at recommendation 3.

Chapter 1 Introduction

This chapter provides background to the inquiry, an overview of the inquiry process and an outline of the structure of the report.

Background to the inquiry

- 1.1 The inquiry was established on 24 June 2015 to inquire into and report on remedies for the serious invasion of privacy in New South Wales.
- 1.2 The terms of reference require the committee to consider the adequacy of existing remedies for serious invasions of privacy, including the equitable action of breach of confidence; and to consider whether a statutory cause of action for serious invasions of privacy should be introduced.
- 1.3 The inquiry was established amidst increasing community concern about the use of social media and surveillance technologies to impinge on the privacy of individuals. Of particular concern was the so-called ‘revenge porn’ phenomenon, in which a person has intimate images of them shared with others without their consent. There has also been growing alarm about the use of surveillance devices such as drones and the ‘leaking’ of individual’s private information by companies that collect that data.
- 1.4 This inquiry was held following a number of comprehensive reports from eminent legal bodies over the past decade, including in particular:
 - the 2008 Australian Law Reform Commission report, *For Your Information: Privacy Law and Practice, Report 108*
 - the 2009 New South Wales Law Reform Commission report, *Invasion of Privacy, Report 120*
 - the 2010 Victorian Law Reform Commission report, *Surveillance in Public Places, Report 18*
 - the 2014 Australian Law Reform Commission report, *Serious Invasions of Privacy in the Digital Era, Report 123*.
- 1.5 All of these reports supported the introduction of a statutory cause of action that would enable an individual whose privacy has been invaded to commence an action for damages.
- 1.6 There are some variations amongst the models recommended or proposed by each law reform commission, which will be considered in more detail in chapter 4. However, it is clear from the various law reform commission reports and other inquiries, and from submissions and evidence given to this inquiry, that there is strong consensus for creating a statutory cause of action to provide an adequate remedy for serious invasions of privacy.
- 1.7 The Senate Legal and Constitutional Affairs References Committee has recently completed an inquiry specifically examining the issue of revenge pornography. The Senate committee recommended that the Commonwealth along with the states and territories enact criminal offences for the recording, sharing of intimate images without consent, and for threatening to

do so. It also recommended that the Commonwealth government give further consideration to the Australian Law Reform Commission's recommendations regarding a statutory cause of action.¹

1.8 The terms of reference are reproduced at page 4.

Conduct of the inquiry

Submissions

- 1.9 A media release announcing the inquiry was sent to all media outlets in New South Wales on 6 July 2015, with advertisements placed in the Early General News section of the *Sydney Morning Herald* and *The Daily Telegraph*.
- 1.10 The inquiry was also advertised via the Legislative Council's twitter feed on 5 July 2015, and letters were sent to a number of key stakeholders inviting submissions.
- 1.11 The committee received a total of 33 submissions from a range of stakeholders including individuals, legal groups, academics, media representatives, as well as from various government agencies including the Australian Law Reform Commission, the Office of the Australian Privacy Commissioner, the NSW Privacy Commissioner, the Information and Privacy Commission NSW, the Civil Aviation Safety Authority and the Department of Justice.
- 1.12 Many of the submissions referred to work previously done in this area, including notable inquiries conducted by the New South Wales and Victorian Law Reform Commissions, and by the Australian Law Reform Commission. The reports of these inquiries have been invaluable in informing the work of the committee.

Public hearings

- 1.13 The committee held two public hearings at Parliament House in Sydney on 30 October 2015 and 16 November 2015. The committee heard from representatives from various organisations, including the NSW Council for Civil Liberties, the Australian Law Reform Commission, the Law Society of NSW, NSW Young Lawyers, Women's Legal Services NSW, the Australian Privacy Foundation, the Arts Law Centre of Australia, Free TV Australia, and the Public Interest Advocacy Centre. It also heard from a number of academics, private citizens, a privacy consultant, and from the NSW Privacy and Information Commissioners.
- 1.14 A full list of witnesses who appeared at the hearings is set out in Appendix 2 and the transcripts are available on the committee's website. A list of documents tabled at the hearings is set out in Appendix 3.
- 1.15 The committee also received written answers to questions taken on notice during the hearing, as well as answers to a number of supplementary questions that were asked of some of the

¹ Recommendations 2, 3 and 6, Senate Legal and Constitutional Affairs References Committee, Parliament of Australia (2016) *Phenomenon colloquially referred to as 'revenge porn'*.

witnesses who gave evidence. A list of those responses is set out in Appendix 4 and the responses are also available on the committee's website.

Structure of the report

- 1.16** This report is comprised of four chapters.
- 1.17** Chapter 2 describes the concerns about privacy and types of serious invasions of privacy highlighted by stakeholders during the inquiry.
- 1.18** Chapter 3 examines the legal framework protecting privacy in New South Wales and discusses the adequacy of available remedies. It also provides an overview of civil and criminal responses to breaches of privacy in various other jurisdictions in Australia and internationally.
- 1.19** Chapter 4 considers the need for a statutory cause of action for serious invasions of privacy in New South Wales and considers the models for such an action proposed by various law reform commissions.

Chapter 2 Types of privacy invasions

*Privacy, once lost, cannot be regained.*²

This chapter considers the concept of privacy and provides an overview of the different types of privacy invasions raised during the inquiry, which primarily related to technology-facilitated invasions. The protections and remedies available in New South Wales for the privacy invasions raised in this chapter, and the adequacy of those protections and remedies, will be examined in chapter 3.

The concept of privacy

2.1 The concept of ‘privacy’ is not easily defined, nor is it always clear when or whether a particular act will impinge upon one’s privacy. The term ‘privacy’ is not defined in any Australian law, however attempts to describe it have generally referred to ‘privacy’ as encompassing the right of an individual to control what other people know about them, and/or a right to be left alone and to be free from interference or intrusion.³

2.2 Attempts to define or conceptualise privacy have sometimes drawn on the distinction between what is ‘public’ and what is ‘private’, however even those attempts acknowledge that there is a significant area in the middle which is not easily captured as either. Gleeson CJ in the leading High Court case on the question of privacy stated:

There is no bright line which can be drawn between what is private and what is not. Use of the term ‘public’ is often a convenient method of contrast, but there is a large area in between what is necessarily public and what is necessarily private.⁴

2.3 Several inquiry participants commented on the challenge of defining the concept. Dr Elizabeth Coombs, the NSW Privacy Commissioner, described privacy as ‘something that an individual believes gives them the right to control their lives and information about them’⁵, and commented that ‘privacy is increasingly becoming an asset’.⁶

2.4 Similarly Ms Anna Johnston of Salinger Privacy acknowledged the difficulty in defining privacy, but suggested it encompassed a range of categories:

The idea of privacy is not easy to define or categorise but normally I break it down into four categories. One is the privacy of your personal information ... the privacy of personal communications; the privacy of personal behavior ... and your territorial privacy ...⁷

² Answers to questions on notice, Dr Normann Witzleb, 11 January 2016, p 2.

³ The ALRC defines ‘intrusion upon seclusion’ as ‘intrusions into a person’s *physical* private space. Watching, listening to and recording another person’s private activities are the clearest and most common examples of intrusion upon seclusion.’ Australian Law Reform Commission (2014) *Serious Invasions of Privacy in the Digital Era; Report 123* (hereafter referred to as ‘ALRC 2014 Report’), p 76.

⁴ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, [42].

⁵ Evidence, Dr Elizabeth Coombs, NSW Privacy Commissioner, Information and Privacy Commission, 30 October 2015, p 2.

⁶ Evidence, Dr Coombs, 30 October 2015, p 2.

⁷ Evidence, Ms Anna Johnston, Director, Salinger Privacy, 16 November 2015, p 39.

2.5 Privacy is protected under various international instruments, including the United Nations Declaration of Human Rights 1948 and the United Nations International Convention on Civil and Political Rights (ICCPR) 1966. Australia is a signatory to both instruments. Article 17 of the 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 or reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

2.6 Victoria and the Australian Capital Territory both establish an individual's right to privacy through their respective human rights frameworks. Each jurisdiction provides 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.⁸

2.7 Notwithstanding the difficulty in defining the concept of privacy, there is widespread acknowledgement and support for protecting it. The NSW Law Reform Commission referred to Lord Reid's analysis in *Ridge v Baldwin* that simply because a concept is difficult to define does not consequentially render it meaningless and unworthy of legal protection:

To suggest that it is impossible to protect privacy generally in the manner proposed in our Bill because the concept cannot be precisely defined is to succumb to what Lord Reid once described as “the perennial fallacy that because something cannot be cut and dried or lightly weighed or measured therefore it does not exist”.⁹

2.8 Building on and acknowledging this, the Australian Law Reform Commission (ALRC) stated that ‘privacy is not less valuable or deserving of legal protection simply because it is hard to define.’¹⁰

2.9 In its 2014 report, *Serious Invasions of Privacy in the Digital Era*, the ALRC set out the following nine guiding principles which, it argued, ought to shape the process of privacy law reform:

- privacy is a fundamental value worthy of legal protection
- there is a public interest in protecting privacy
- privacy should be balanced with other important interests
- Australian privacy laws should meet international standards
- privacy laws should be adaptable to technological change
- privacy laws should be clear and certain
- privacy laws should be coherent and consistent
- justice to protect privacy should be accessible
- privacy protection is an issue of shared responsibility.¹¹

⁸ Submission 9, Public Interest Advocacy Centre, p 3, quoting s 13 *Charter of Human Rights and Responsibilities Act 2006* (Vic) and s 12 *Human Rights Act 2004* (ACT).

⁹ New South Wales Law Reform Commission (2008) *Invasions of Privacy; Report 120*, p 18.

¹⁰ ALRC 2014 Report p 31.

‘Revenge pornography’ and other technology-facilitated abuse

- 2.10** The explosion of technology over the past decade in particular has meant that most people in Australia now have access to high resolution cameras on their mobile phones and the ability to easily upload images and videos to the internet. These technological advancements have contributed to a rise in a type of privacy invasion commonly referred to as ‘revenge pornography’.
- 2.11** The typical ‘revenge pornography’ scenario is one where a person has an intimate or sexually explicit image or video of themselves posted online by their ex-partner without their consent. In some instances, the material is published to a revenge porn website. It has been reported that at least 3,000 websites ‘feature the revenge genre.’¹²
- 2.12** Recently published research by criminologists and socio-legal academics Dr Nicola Henry, Dr Anastasia Powell and Dr Asher Flynn suggests that one in ten Australians aged between 18 and 55 years have had a nude or semi-nude image of them sent to others without their permission.¹³
- 2.13** Drs Henry, Powell and Flynn noted that that an image need not be sexually explicit, but may depict a person in a state of undress or semi undress. Some stakeholders also noted the importance of cultural expectations in relation to this type of behaviour. A specific example raised by both Women’s Legal Services and the Public Interest Advocacy Centre was the taking and distributing of an image of a person who wears a religious headscarf without that attire, which could be considered a form of ‘intimate image.’¹⁴
- 2.14** Drs Henry, Powell and Flynn suggested that the term ‘image based sexual exploitation’¹⁵ is more appropriate than ‘revenge pornography’ because it better recognises the offensive conduct as being that of the perpetrator, rather than focusing on the behaviour of the victim.¹⁶ It also recognises that the motivation for such conduct is not always ‘revenge’, as demonstrated by an incident involving model Lara Bingle where a photograph was taken of her in the shower by footballer Brendan Fevola, with whom she was having an intimate relationship with. Mr Fevola subsequently shared the image without Ms Bingle’s consent or knowledge. There were reports in the aftermath that Ms Bingle wanted to sue Mr Fevola for ‘breach of privacy, defamation and misuse of her image’,¹⁷ however such an action never eventuated.

¹¹ Submission 4, Australian Law Reform Commission, pp 1-2, quoting ALRC 2014 Report, ch 2.

¹² E-brief: Revenge pornography, privacy and the law (NSW Parliamentary Research Service), August 2015, e-brief issue 7/2015, quoting ‘Revenge Porn Misery Merchants: How should the online publication of explicit images without their subject’s consent be punished?’ 2014, The Economist.

¹³ Evidence, Dr Anastasia Powell, Senior Lecturer, Justice and Legal Studies, RMIT University, 30 October 2015, p 29. See also Tabled document, A Powell & N Henry, *Digital Harassment and Abuse of Adult Australians: A Summary Report*, 2015 p 2.

¹⁴ See Submission 32, Women’s Legal Services NSW, p 5; Evidence, Mr Edward Santow, Chief Executive Officer, Public Interest Advocacy Centre, 16 November 2015, p 47.

¹⁵ Submission 13, Dr Nicola Henry, Dr Anastasia Powell and Dr Asher Flynn, p 1.

¹⁶ Submission 13, Dr Nicola Henry, Dr Anastasia Powell and Dr Asher Flynn, p 1.

¹⁷ Thomas Hunter, *Bingle lawsuit against Fevola over nude photo strikes a blow for women's rights, says agent*, 2 March 2010, The Sydney Morning Herald Online, <http://www.smh.com.au/lifestyle/celebrity/bingle-lawsuit-against-fevola-over-nude-photo-strikes->

2.15 The defining qualities of ‘image based sexual exploitation’ was described to the committee as either that:

... the image was taken and/or distributed *without a person’s expressed consent*; the image was used or misappropriated in a way that a reasonable person would understand to be a *violation of that person’s privacy*; or the image was used or misappropriated in a way that a person would understand *might cause fear, apprehension, or mental harm to the victim* [Emphasis in original].¹⁸

2.16 A number of inquiry participants cited the distribution, or even just threatened distribution, of intimate images without the subject’s consent as a serious form of privacy invasion. Some participants referenced this type of invasion as a form of domestic or gender based violence and described how it could affect a person’s willingness to seek help. Dr Anastasia Powell explained:

... legal services told us about women who had given consent to an image being taken but then the threat of distribution of that image was used to harass and control them. The stories we have heard from women’s legal service providers in particular are that women are reluctant to report domestic violence to police. They are reluctant to apply for intervention orders because they are fearful that the image will be sent to their family and friends through their social network. The impact of that threat carries a lot of weight if they are in a domestic violence situation.¹⁹

2.17 However, the existence of a personal relationship between the victim and the person who takes or distributes an intimate or sensitive image need not exist. Inquiry participant Witness A shared her experience of having had a nude image taken of her by a nurse while undergoing a medical procedure.

Case study – Witness A²⁰

In 2014 Witness A underwent a routine gynaecological procedure under sedation in a private hospital. While under sedation, a nurse took a photo of Witness A’s genitals using her iPhone. As Witness A was coming out of sedation she saw the nurse showing another nurse her phone.

Witness A was not informed of what had happened until five weeks later when her surgeon called to inform her about the photo. She was told that the nurse had shown the image to other nurses, who had made a complaint to the hospital. Shortly after this phone call the hospital also rang to inform her about the incident and to request a meeting.

a-blow-for-womens-rights-says-agent-20100301-pdv5.html; Fiona Byrne, *Lara Bingle will sue Brendan Fevola over raunchy nude photo*, 2 March 2010, The Herald Sun Online, <http://www.dailytelegraph.com.au/entertainment/sydney-confidential/bingle-will-sue-brendan-fevola-over-raunchy-nude-photos/story-e6frefx0r-1225835813601>.

¹⁸ Submission 13, Dr Nicola Henry, Dr Anastasia Powell and Dr Asher Flynn, p 2.

¹⁹ Evidence, Dr Powell, 30 October 2015, p 30.

²⁰ Submission 19, Name suppressed; *In camera* evidence, Witness A, 30 October 2015; *In camera* evidence, Witness A, 16 November 2015.

Witness A contacted the police and her solicitor. The police investigated the incident but determined that the available criminal offences could not be made out as there was no evidence that the motivation was sexual in nature.

The hospital informed Witness A that they intended to advise the Australian Health Practitioner Regulation Agency, however did not provide any further information about that process. In order to find out more about the complaint she contacted the NSW Health Care Complaints Commission (HCCC). Witness A felt that the HCCC provided 'limited information' before referring her to the Nursing and Midwifery Council of New South Wales. She described the Council as 'really helpful' and subsequently made a formal complaint to that body. The Nursing Midwifery Council reprimanded the nurse, but the offence was not deemed serious enough to cancel the nurse's registration. The nurse ultimately left the hospital and is still practising as a theatre nurse in another hospital.

As a result of the incident Witness A has had to take leave from her job and is afraid that the image will surface one day and impact on her or her child's life. She is currently bearing the costs of seeing a psychologist weekly because of the incident, as well as the associated legal costs in engaging a solicitor to provide legal advice on the matter.

- 2.18** The NSW Privacy Commissioner told the committee that 'remedies available under NSW privacy legislation are inadequate for these circumstances.'²¹ The severe impact of these types of privacy invasions on victims was described by Dr Coombs as affecting the person's sense of self and safety:

[Disseminating intimate images without consent] most definitely is not acceptable behaviour. It is extremely offensive. It gives us a sense of the different way that violence can be perpetrated in our community than it once was. Once you could shut your door on people who wished to attack you. But now with cyber identity and a cyber profile there is the means to put things out beyond just your immediate circle to the whole world. It is incredibly damaging to the individual. It strikes at the heart of who they are and what they are.²²

- 2.19** The committee also heard about other types of behaviours that could be described as serious invasions of privacy that were noted as occurring in a domestic violence, abuse and harassment context. Specifically, Ms Liz Snell, Law Reform and Policy Coordinator of Women's Legal Services NSW referred to the use of technology to stalk, harass or track people, reporting that it was becoming increasingly common:

Over the past few years we have seen a significant increase in technology-facilitated stalking and abuse – that is, the use of technology such as the internet, social media, mobile phones, computers and surveillance devices to stalk and perpetrate abuse on a person. In particular, we are seeing a concerning trend of technology being regularly used against women by perpetrators as a tactic within the wider context of domestic violence.²³

²¹ Answers to questions on notice, Dr Elizabeth Coombs, NSW Privacy Commissioner, 25 November 2015, p 1.

²² Evidence, Dr Coombs, 30 October 2015, p 4.

²³ Evidence, Ms Liz Snell, Law Reform and Policy Coordinator, Women's Legal Services NSW, 30 October 2015, p 44.

2.20 Speaking about her work in the week of her hearing appearance before the committee, Ms Alexandra Davis, Solicitor at Women’s Legal Services NSW, said that more than half of her clients on a single day had presented with ‘issues of technology facilitated stalking and abuse.’²⁴ This extended beyond the typical ‘revenge pornography’ scenario to other types of privacy invasion including the use of surveillance devices such as tracking applications and spyware installed on mobile phones. Ms Davis told the committee that it was ‘common’ for women to be subjected to surveillance without their knowledge or consent by current or estranged partners:

We have clients who are separated under one roof, where they are still living with a perpetrator but in separate locked away bedrooms, and they find surveillance devices in their private rooms ... Also with surveillance devices you have a lot of spyware and GPS tracking and often the things that are most insidious are the things that we commonly use, Find my Phone in your iPhone or things that are linked up through Cloud computing and children being given devices that already have things on them ... Many of these things can be remotely removed from the phone and are not detectable.²⁵

2.21 Ms Davis went on to say that, in her experience, police did not respond well to complaints of this nature. Ms Snell and Ms Davis suggested this was partly a police attitudinal and training issue, and partly a resources issue, particularly in relation to apprehended violence order proceedings or summary criminal matters:

... there needs to be continuous training with police about the nature and dynamics of violence [because] it seems as though technology-facilitated violence is treated as a lesser form of violence and we would challenge that. Also we think police would benefit by having training about the law itself ... There is [also] the training issue and it is our experience that police do not seem to understand the technology and the gathering of evidence.²⁶

...

... we have had clients where the police refused to do that because of the costs and because running computer forensics is done by certain crime units. Those sorts of matters are usually reserved for indictable offences and things that are considered more serious than, for example, a breach of an Apprehended Violence Order [AVO] or a stalking or intimidation offence.²⁷

Other forms of surveillance or information capture

2.22 Technology has also created increased capacity for individuals to monitor, survey and capture images in public and private spaces in ways that did not exist a few decades ago. In recent years in particular, the quality and availability of surveillance and recording devices including cameras used in the context of home and property security, workplace environments or on drones has increased, while the price of such devices has decreased. The combination of

²⁴ Evidence, Ms Alexandra Davis, Solicitor, Women’s Legal Services NSW, 30 October 2015, p 45.

²⁵ Evidence, Ms Davis, 30 October 2015, p 49.

²⁶ Evidence, Ms Snell, 30 October 2015, p 46.

²⁷ Evidence, Ms Davis, 30 October 2015, p 48.

enhanced image capture combined with easier accessibility has resulted in increased potential for individuals to have their privacy invaded in a myriad of ways. As observed by the ALRC:

The increasing pervasiveness of instantaneous communications technology, including the use of mobile phone technology, drones and surveillance and tracking devices, has undoubtedly increased the risks of invasions of privacy.²⁸

2.23 A number of inquiry participants referred to neighbourhood surveillance as a particular form of serious invasion of privacy. For example, in his submission to the inquiry the Hon Greg Piper MP referred to complaints from two of his constituents who were subjected to surveillance by a neighbour that was ‘intimidatory and intrudes on their privacy’:

One of the complainants reported that the house in question had seven audio-enabled cameras installed, some of which were directed at his lounge room window, front entry stairs, driveway and back yard. The other complainant said there were cameras directed towards her bedroom window, the front of her house and into her backyard.²⁹

2.24 Two submissions were received from people who described the distress they experienced as a result of a neighbour training surveillance cameras on their property:

A few months ago, they had seven security cameras professionally installed, recording video and audio, which I believe is illegal in NSW. What is bothering me and causing me a tremendous amount of stress and depression, is the fact that three of the cameras are pointed at my property. One on my driveway, one at my lounge window and one at my back staircase and backyard.³⁰

Quite recently they had security cameras installed professionally, seven to be exact! Two cameras are pointing directly at my house and driveway ... Whenever I walk to my letterbox I have to hide under an umbrella., and when I do some gardening I have to hide under the umbrella. I don’t want to be their entertainment. These two individuals have made my life a misery!³¹

2.25 Both of these submission authors and Mr Piper referred to a lack of appropriate options for redress.³² Mr Piper referred to fellow MP, the Hon Mark Speakman, who had also been approached by constituents about the issue. Mr Speakman noted the lack of recourse available to people who were subjected to neighbourhood surveillance:

At the least there is uncertainty and, more likely, a lack of remedy in current law. At best, the law is unclear; at worst, the law fails to protect the privacy of those whose neighbours use surveillance cameras. It is clear that reform is required.³³

²⁸ Submission 4, Australian Law Reform Commission, p 2.

²⁹ Submission 3, Mr Greg Piper MP, p 1.

³⁰ Submission 6, Name suppressed, p 1.

³¹ Submission 7, Name suppressed, p 1.

³² Submission 3, Mr Greg Piper MP, p 2; Submission 6, Name suppressed, p 1; Submission 7, Name suppressed, p 1.

³³ Submission 3, Mr Greg Piper MP, p 2, quoting *Hansard*, NSW Legislative Assembly, 23 November 2011 (Mark Speakman).

2.26 The NSW Privacy Commissioner confirmed that the state's existing legislative framework does not protect people who are concerned about a neighbour invading their privacy by recording images from their property via closed-circuit television cameras, even if the cameras are directed at a neighbour's bedroom or a backyard where children play:

[N]either of the pieces of New South Wales legislation addresses acts undertaken by private individuals or small businesses ... the health legislation ... does provide some coverage – but it is patchy. There are other serious incursions of privacy, and we hear about that ... [People] are concerned that they are not able to find a readily available, easy and inexpensive way of getting redress. It is of concern to them. Of course it then becomes a matter of concern for me as the NSW Privacy Commissioner.³⁴

2.27 Mr Kirk McKenzie of the NSW Law Society's Human Rights Committee told the inquiry that while there was some restriction on the recording of sound without consent, there were no similar prohibitions on the recording of images without consent.³⁵

2.28 There has also been substantial media coverage in recent times focusing on privacy concerns raised by the use of unmanned aircraft or drones.³⁶ The committee did not receive any evidence from people who had their privacy breached in this way, but a number of inquiry participants referenced drones as a potential privacy issue.

2.29 The Civil Aviation Safety Authority (CASA) indicated that it was 'aware of community concerns regarding the part played by unmanned aerial vehicles (UAVs) in possible invasions of privacy,'³⁷ but noted that privacy issues were outside its remit.

2.30 The Arts Law Centre of Australia pointed out that the Civil Aviation Safety Regulations 1998 'prohibit the flying of drones over populated areas', and submitted that the penalty regime provides for adequate remedies for people who have suffered privacy invasions as a result of a breach of the regulations.³⁸

2.31 However, as CASA noted in its submission, while it regulates the use of unmanned aerial vehicles, these regulations relate only to safety as opposed to privacy concerns. In its submission it stated:

The limitation on flying a UAV within a specified distance of persons is based on safety related considerations, not privacy-related considerations ... [The Act] qualifies or conditions the power [of the Governor General to make regulations under the Act] on matters relating to or connected to safety, CASA considers regulations could not

³⁴ Evidence, Dr Coombs, 30 October 2015, p 4.

³⁵ Evidence, Mr Kirk McKenzie, Chair, Human Rights Committee, NSW Law Society, 30 October 2015, p 39.

³⁶ For example, Michelle Bingemann, 'Attack of the drones causes complaints but fines level out', *The Australian*, 15 January 2016, p 24; Kieran Gair, *Privacy concerns mount as drones take to the skies*, 12 December 2015, *The Sydney Morning Herald*, <http://www.smb.com.au/digital-life/consumer-security/privacy-concerns-mount-as-drones-take-to-the-skies-20151208-glijvk.html>; Rick Sarre, *Drones finally get MPs talking tougher on privacy laws*, 17 July 2014 *The Conversation*, <http://theconversation.com/drones-finally-get-mps-talking-tougher-on-privacy-laws-29197>.

³⁷ Submission 28, Civil Aviation Safety Authority, p 1.

³⁸ Submission 11, Arts Law Centre of Australia, p 3.

be made under the Act to prohibit the operation of an aircraft or UAV for the purpose of protecting the privacy of persons.³⁹

- 2.32** Mr Bruce Baer Arnold, Director of the Australian Privacy Foundation observed that the operation of drones is not generally regulated in a way designed to protect privacy:

It is not illegal, generally, to own and operate a small drone, subject to the framework for how we characterise a drone and where it is flying – for example, you cannot fly it over a defence facility.⁴⁰

- 2.33** A similar point was made by Ms Anna Johnston, Director of Salinger Privacy, who noted the limitations of the existing privacy framework in addressing drone concerns. Referring to the Commonwealth *Privacy Act 1988* (which is discussed further in chapter 3), she noted that there is a ‘black hole’ in regards to a person capturing images via drones as the Act only applies to businesses with an annual turnover threshold of less than \$3M (except for health service providers):

So the videographer flying drones over residential properties and filming people in their backyards? Not regulated.⁴¹

‘Big data’ breaches

- 2.34** A number of inquiry participants referred to privacy concerns arising from the collection and retention by governments and corporations of masses of private data about individuals, noting that ‘big data’ breaches have, in recent years, become a significant privacy concern.

- 2.35** The Macquarie Dictionary defines ‘big data’ as ‘a data set that is extremely large so that it can be mined for patterns, trends and associations, as in relation to human behaviour online.’⁴² Governments and corporations collect masses of data for a myriad of reasons. Ms Johnston explained the attraction of collecting and analysing big data:

The lure of Big Data analytics is that with enough data, organisations can make insightful correlations, which they can then use to make business predictions or decisions. Woolworths’ insurance arm allegedly only makes car insurance offers to those who are considered at lower risk of car accidents, which apparently has something to do with the consumption of red meat over pasta – and it knows what you eat because you shop at its supermarkets.⁴³

- 2.36** The privacy concerns arising in respect of big data tend to have two foci. First, there are ethical questions about how private information is captured and subsequently used without the subject’s knowledge or consent. Second, there are concerns that the way governments and

³⁹ Submission 28, Civil Aviation Safety Authority, p 4.

⁴⁰ Evidence, Mr Bruce Baer Arnold, Director, Australian Privacy Foundation, 30 October 2015, pp 55-56.

⁴¹ Submission 8, Salinger Privacy, p 3.

⁴² Susan Butler (ed) *Macquarie Dictionary* (Macmillan Publishers Group Australia, 13th ed, 2015).

⁴³ Anna Johnston, *Privacy in the age of the algorithm: a primer in ethics for using Big Data*, 2 June 2015 Salinger Privacy blog, <http://www.salingerprivacy.com.au/2015/06/02/privacy-in-the-age-of-the-algorithm/>.

corporations store and secure this data fails to reach an appropriate standard, leaving the door open for private individual data to be accessed by unauthorised persons, or otherwise released.

2.37 The Office of the Australian Information Commissioner defines a data breach as ‘when personal information held by an agency or organisation is lost or subjected to unauthorised access, modification, disclosure, or other misuse or interference.’⁴⁴

2.38 Dr Normann Witzleb, Associate Professor, Faculty of Law, Monash University, submitted that this type of privacy breach would tend to fall into the negligent category, even though it often has the capacity to cause significant harm. He cited, for example, the ‘accidental publication in February 2014 of the personal details of almost 10,000 asylum seekers by the Australian Department of Immigration on its website’, and the release of user data obtained by hackers from Ashley Madison, a commercial dating website enabling extramarital affairs.⁴⁵

2.39 Dr Coombs also noted the 2013 breach affecting Adobe customers, which impacted ‘38 million people worldwide of which 1.7 million were Australians.’⁴⁶

2.40 Dr David Vaile, Vice Chair of the Australian Privacy Foundation, noted the increasing challenge facing corporations and governments collecting masses of personal data in a world where security breaches are becoming more and more frequent:

The capacity for 100 per cent or guaranteed perimeter security, basically keeping the people you do not want in out, the chances of doing that have been declining over the last couple of years. We see that on the global stage where you would be hard pressed to find any single entity, whether business or government, who could put their hand on their heart and say, “Don't worry, it's safe. We have done the right thing and no-one can get in.”⁴⁷

2.41 Dr Vaile asserted that it was ‘almost inevitable’ that there would be breaches:

The realistic result of where we are at the moment – because the intruders only need to be 0.1 per cent successful to find the hairline crack in your defences whereas the defenders have to be 99.9999 per cent good enough – the result is likely to be that breaches are almost inevitable at some stage. That is not in every case and not perhaps in the next five minutes or five years in a particular circumstance.⁴⁸

2.42 In that context, he argued that it was important that corporations ‘do the best they can in the circumstances’, by acting ethically to implement best practice security standards and by clearly communicating risks to consumers or those subject to information capture.

... rather than saying ‘We never thought it could happen, We are not going to take any precautions or crank up the security so it is world's best practice’, the proper realistic approach would be to say: ‘no protection at the moment can guarantee that so as well

⁴⁴ Submission 30, Dr Normann Witzleb, p 9, quoting Office of the Australian Information Commissioner, *Data breach notification guide: A guide to handling personal information security breaches*, August 2014, p 2.

⁴⁵ Submission 30, Dr Normann Witzleb, p 9.

⁴⁶ Evidence, Dr Coombs, 30 October 2015, p 2.

⁴⁷ Evidence, Dr David Vaile, Vice-Chair, Australian Privacy Foundation, 30 October 2015, p 54.

⁴⁸ Evidence, Dr Vaile, 30 October 2015, p 54.

as investing more in the defensive side of it we should look at ways to mitigate the harm when it happens such as, maybe we don't join things together, maybe we don't keep the credit card, maybe we encode or encrypt or fragment, maybe we do not ask some questions. There are a whole range of things we can do.⁴⁹

Committee comment

- 2.43** The committee acknowledges that the concept of privacy is a complex and somewhat amorphous one. The challenge of defining what privacy is makes it difficult to clearly articulate all the scenarios in which one's privacy might be invaded, and subsequently to ensure legal protections are appropriately targeted. Indeed, what some people consider an invasion of privacy may be of little concern or consequence to others.
- 2.44** However, the committee notes that much of the evidence it received relates to specific types of conduct which inquiry participants considered constitute a serious invasion of privacy. These include technology-facilitated abuse (particularly 'revenge pornography'), drones and other surveillance devices including those that capture the activities of neighbours, and breaches of databases that capture large quantities of personal information. The committee is significantly concerned by the growing trend of these activities, and the impact they have on the victims of such privacy breaches.
- 2.45** The committee accepts that the ALRC's nine guiding principles to shape the process of privacy law reform are balanced, clear and provide a basis on which governments should proceed to reform the law in this area.
- 2.46** The committee notes that the much of the evidence relating to technology-facilitated abuse was raised by inquiry participants as being a particular issue in the context of domestic and family violence. The committee recognises however that there is the potential for that type of invasion outside of those contexts, and acknowledges the experience of Witness A in particular.
- 2.47** While the committee received no direct evidence from victims of drone or unmanned aerial vehicle surveillance, it is clear that the increased use of these devices is an issue that is receiving more attention in the privacy space. We would be ignoring the reality of the matter if we did not accept the view that this is an area of intrusion into privacy that is likely to become more topical and more widespread in coming years. This adds weight to the case for adopting a comprehensive and well-founded remedy for serious breaches of privacy to allow for any such disputes to be resolved in a timely, cost-effective and constructive manner.
- 2.48** The available remedies in New South Wales for the types of privacy invasions raised in this chapter and the adequacy of those remedies is considered in the next chapter.

⁴⁹ Evidence, Dr Vaile, 30 October 2015, p 54.

Chapter 3 Current protections and remedies

This chapter describes the current statutory and common law privacy framework that applies in New South Wales in civil and criminal jurisdictions. It also provides a brief overview of developments in other Australian states and internationally with regard to protection against and redress for serious invasions of privacy.

The question of whether a statutory cause of action for serious invasions of privacy should be introduced in New South Wales will be considered in chapter 4.

Privacy legislation

Privacy and Personal Information Protection Act (NSW)

- 3.1 The *Privacy and Personal Information Protection Act 1998* (PIIP Act) is the first of two key pieces of legislation protecting information privacy in New South Wales. The PIIP Act applies to all New South Wales public sector agencies and, where contractual arrangements require compliance with the PIIP Act, to private sector and non-government organisations.⁵⁰
- 3.2 The PIIP Act regulates the way that personal information about members of the public is collected, used, accessed, stored, disposed of and disclosed.
- 3.3 The NSW Civil and Administrative Tribunal (NCAT) has the power to review the conduct of agencies under Part 5 of the PIIP Act.⁵¹ Where there are breaches of the Act, civil action can be brought before the tribunal for damages up to a maximum of \$40,000. However, the committee was informed that the maximum \$40,000 in damages is rarely ordered, with the last maximum award occurring in 2011. The average compensation awarded where a breach is established ranges between \$5,000 and \$8,000.⁵²
- 3.4 There is a requirement that the conduct in question be internally reviewed by the relevant agency before a person can make an application for damages. The conduct covered by Part 5 relates to contravening a privacy protection principle, code of practice, or disclosure of information kept in a public register.⁵³
- 3.5 There are a range of civil liability exemptions in the PIIP Act, some of which have been the subject of criticism. For example, ss 23 and 24 of the Act provide exemptions for law enforcement and investigations designed to enable police and other investigative bodies to properly perform their functions, while balancing the public interest in privacy. Section 27 provides a further exemption for all police activities, other than educative or administrative activities, which Salinger Privacy considered to be an 'entirely unnecessary blanket

⁵⁰ Submission 31, Dr Elizabeth Coombs, NSW Privacy Commissioner, Attachment B.

⁵¹ Submission 29, Department of Justice, NSW Government, p 4.

⁵² Submission 31, Dr Elizabeth Coombs, NSW Privacy Commissioner, p 10.

⁵³ Submission 29, Department of Justice, NSW Government, p 4.

exemption'.⁵⁴ Ms Anna Johnston, former Deputy Privacy Commissioner of NSW and now privacy consultant, argued that s 27 has the effect of:

... render[ing] many police activities unaccountable in terms of privacy protection, even where a police officer acts corruptly or unlawfully – because negligent, reckless, unlawful or corrupt conduct is not an 'administrative or educative function'.⁵⁵

3.6 Ms Johnston gave the following examples of conduct that have been determined, either by the former Administrative Decisions Tribunal (which now forms part of NCAT) or by a New South Wales court, to be exempt from the privacy requirements imposed by the PPIP Act as a result of s 27:

... unlawful police behaviour like obtaining personal information by way of an invalid subpoena? Exempt.

Malicious police behaviour like disclosing information about the sexuality of a woman to her boyfriend, which results in the woman being assaulted by her enraged partner? Exempt.

A negligent or reckless failure to check a child protection allegation which the police "know is false or should reasonably be expected to know to be false" before acting on it? Exempt.

Systemic problems like a failure to ensure the accuracy of bail records, so that hundreds of kids end up wrongly arrested or imprisoned? Exempt.

A failure to enforce data retention rules, so that decades-old 'spent' convictions are disclosed to a man's partner and employer? Exempt.

Poor data security practices like a single shared login, no register of authorised users and no staff training when accessing public street CCTV footage? Exempt.⁵⁶

3.7 Ms Johnston, arguing for abolition of s 27, commented:

You can have blanket exemptions which allow corruption and negligence to thrive, or you can have nuanced, sensible, balanced exemptions to enable legitimate law enforcement, but allow remedies for victims of illegitimate police conduct.⁵⁷

3.8 Salinger Privacy labelled some of the exemptions to the privacy protection afforded by the PPIP Act as 'unjustifiable loopholes',⁵⁸ which Ms Johnston described as:

Loopholes ... so wide you could drive a truck full of privacy-invaders through them, and still have room for a parade of dancing elephants on either side.⁵⁹

⁵⁴ Submission 8, Salinger Privacy, p 3.

⁵⁵ Submission 8, Salinger Privacy, pp 3-4.

⁵⁶ Submission 8, Salinger Privacy, p 4.

⁵⁷ Submission 8, Salinger Privacy, p 4.

⁵⁸ Submission 8, Salinger Privacy, p 3.

⁵⁹ Submission 8, Salinger Privacy, p 3.

3.9 The NSW Law Reform Commission acknowledged the need to strike an appropriate balance so that agencies exempted from complying with privacy principles by virtue of s 27 were not using the legislation as a ‘secrecy shield’.⁶⁰ The NSW Privacy Commissioner noted in her submission that in a 2010 report on privacy the law reform commission said, in reference to the police:

... we are of the view that there is no justification for the current level of exemption for the NSW Police Force. It will often be appropriate in circumstances to subject personal information held by the NSW Police Force to privacy principles. While it is important to recognise that their investigative and law enforcement functions are immune from privacy protection, other functions should otherwise remain subject to privacy principles.⁶¹

3.10 Concerns were also raised during the inquiry in respect of the PPIP Act’s application to information transmitted outside of New South Wales. Section 18 of the Act prescribes limits on the disclosure of personal information held by public sector agencies (the disclosure principle). Section 19(2) of the Act regulates trans-border disclosures of personal information by public sector agencies. In 2008, the then Administrative Decisions Tribunal determined that s 19(2) of the Act ‘covered the field’ for trans-border disclosures, so that the s 18 disclosure principle did not apply. At the same time, however, the tribunal noted that s 19(2) never actually commenced, and therefore took the view that there were:

... no restrictions on disclosures outside NSW [meaning that] ... if you are a public servant who wants to disclose something you know you shouldn’t, and which would breach the general prohibition against disclosure at s.18, you can circumvent the law by first sending the information to someone outside NSW, who can then pass the information on to your intended recipient⁶² [Emphasis in original].

3.11 On 24 November 2015, the *Privacy and Personal Information Protection Amendment (Exemptions Consolidation) Act 2015* was passed, with some of the amendments altering s 19 with a view to addressing the issues relating to trans-border disclosures. The Attorney-General stated in the second reading speech that the amendment to the section:

... will impose some additional requirements upon New South Wales public sector agencies when disclosing personal information outside New South Wales, as was originally intended, compared with current practice, where there are currently no restrictions. This will increase the level of protection for the personal information of New South Wales citizens when it is transferred out of the State, whilst ensuring New South Wales public sector agencies retain flexibility to share information across borders.⁶³

3.12 Most of the amending Act commenced on 1 January 2016, with the amendments to s 19 to commence in April 2016.

⁶⁰ Submission 31, Dr Elizabeth Coombs, NSW Privacy Commissioner, p 9, quoting NSW Law Reform Commission, *Report 127: Protecting Privacy in New South Wales*, May 2010 (hereafter referred to as ‘NSWLRC 2010 Report’), p 118.

⁶¹ Submission 31, Dr Elizabeth Coombs, NSW Privacy Commissioner, pp 9-10, quoting NSWLRC 2010 Report, p 118.

⁶² Submission 8, Salinger Privacy, p 4.

⁶³ *Hansard*, NSW Legislative Assembly, 22 October 2015, p 4952 (Gabrielle Upton).

- 3.13** Ms Johnston also raised concerns in regards to s 21 of the PPIP Act, which has been interpreted by the tribunal in such a way as to protect public sector agencies from liability when a ‘rogue employee’ breaches the privacy protections afforded by the Act. She referred to this as the ‘personal frolic exemption’:

[Section 21] has conveniently allowed public sector agencies to avoid having to provide any redress to victims of privacy breaches caused by the conduct of their employees, by arguing that the employee wasn’t *really* acting as an employee when they did that bad thing, so the agency cannot possibly be held liable. Which sounds fine in theory, but leaves the victim with zero redress.⁶⁴

- 3.14** In regard to these cases, Ms Johnston noted that while there are criminal sanctions available under the PPIP Act, they are rarely used and do not redress the harm to the victim:

...for the victim of [an] invasion of privacy there is no remedy. Both PPIPA and HRIPA [*Health Records and Information Privacy Act 2002*] have criminal provisions. So in the rogue employee scenario, that person could be prosecuted – the penalty is up to two years imprisonment – for unauthorised use or disclosure of personal or health information. The problem with that is that there has been only one prosecution in New South Wales in 15 years, and that was overturned on appeal. Even if you successfully prosecute, the victim gets nothing by way of remedy.⁶⁵

- 3.15** It was not suggested to the committee that s 21 of the PPIP Act be reformed, but rather that it highlighted a gap in redress options for victims.

Health Records and Information Privacy Act (NSW)

- 3.16** The *Health Records and Information Privacy Act 2002* (HRIP Act) is the second key piece of legislation protecting information privacy in New South Wales. The HRIP Act protects the privacy of individual’s health information that is held by public and private sectors. It also provides for ‘an accessible framework for the resolution of complaints regarding the handling of health information’.⁶⁶
- 3.17** No concerns regarding the HRIP Act were raised during the inquiry.

The role of the NSW Privacy Commissioner

- 3.18** The NSW Privacy Commissioner is empowered under both the PPIP Act and the HRIP Act to receive, investigate and conciliate complaints about alleged breaches of both Acts.⁶⁷ The Privacy Commissioner has powers akin to those of a Royal Commission that enable him or her to compel any person or public sector agency to give information, however the Commissioner cannot make determinations.⁶⁸

⁶⁴ Submission 8, Salinger Privacy, p 5.

⁶⁵ Evidence, Ms Anna Johnston, Director, Salinger Privacy, 16 November 2015, p 33.

⁶⁶ *Health Records and Information Privacy Act 2002* (Cth), s 3(1)(c).

⁶⁷ *Privacy and Personal Information Protection Act 1998* (Cth), Divisions 2 and 3; *Health Records and Information Privacy Act 2002* (Cth), Part 7.

⁶⁸ Submission 31, Dr Elizabeth Coombs, NSW Privacy Commissioner, Attachment B.

Privacy Act 1988 (Cth)

- 3.19** Also applicable in New South Wales is the Commonwealth *Privacy Act 1988*. The Act contains 13 privacy principles (Australian Privacy Principles or ‘APPs’) that ‘regulate the retainment and handling of personal information’.⁶⁹ The *Privacy Act* defines personal information as ‘information or an opinion about an identified individual, or an individual who is reasonably identifiable whether the information or opinion is true or not.’⁷⁰
- 3.20** The *Privacy Act* applies to all Australian Government agencies, and also to private sector organisations that have an annual turnover of over \$3 million.⁷¹ The Act is limited in the types of privacy intrusions it applies to, with the ALRC noting it ‘does not generally apply to intrusions into personal privacy or to the behavior of individuals or media entities.’⁷²
- 3.21** Remedies available under the *Privacy Act* include warnings to the respondent to cease conduct, or awards of compensation which are enforceable through the Federal Court.
- 3.22** A number of inquiry stakeholders including NSW Young Lawyers, Dr Normann Witzleb and Mr Seppy Pour suggested that while the Commonwealth *Privacy Act* provides some privacy protection, those protections are restricted in that they apply only to information privacy, they fail to address intrusions to personal privacy, and they do not apply to individuals or businesses with an annual turnover of less than \$3 million.⁷³

Committee comment

- 3.23** The committee notes that information privacy in New South Wales is protected under the PPIP Act, HRIP Act and Commonwealth *Privacy Act*; however, we also note that those protections are limited in that they only cover certain organisations and individuals.
- 3.24** The committee notes the concerns raised in respect of the PPIP Act relating to exemptions to police activities under s 27; however, we did not receive sufficient evidence to warrant recommending amendments to this provision.
- 3.25** In regard to s 19(2), the committee acknowledges the amendments passed by the Parliament to address concerns relating to trans-border disclosure of information under the PPIP Act. The committee welcomes the move to address the concerns relating to such disclosures, and, looks forward to seeing the effect of the new provisions when they commence in April 2016.
- 3.26** The committee notes the comments made by Ms Johnston in respect of the so-called ‘personal frolic’ exemption arising as a result of the Administrative Decisions Tribunal’s interpretation of s 21, and the way it has been interpreted so as to protect public sector

⁶⁹ *Privacy Act 1988* (Cth), Schedule 1, cited in Submission 5, Mr Seppy Pour, p 5.

⁷⁰ *Privacy Act 1988* (Cth), s 6(1), cited in Submission 5, Mr Seppy Pour, p 5.

⁷¹ *Privacy Act 1988* (Cth) ss 6(1), 6C(1), 6D.

⁷² Australian Law Reform Commission (2014) *Serious Invasions of Privacy in the Digital Era; Report 123* (hereafter referred to as ‘ALRC 2014 Report’), p 53.

⁷³ Submission 5, Mr Seppy Pour, p 13; Submission 9, Public Interest Advocacy Centre, p 5; Submission 25, NSW Young Lawyers, Communications, Entertainment & Technology Law Committee, pp 7-8; Submission 26, NSW Council for Civil Liberties, p 8; Submission 30, Dr Normann Witzleb, p 10. See also, Evidence, Ms Johnston, 16 November 2015, pp 37-38.

agencies in circumstances where a ‘rogue employee’ breaches the privacy protections afforded by the Act. It has considered the implications of this in the context of the desirability of recommending a statutory cause of action for serious invasions of privacy, which is considered in chapter 4.

- 3.27** We note that no concerns were raised during the inquiry regarding the HRIP Act.
- 3.28** In regard to the NSW Privacy Commissioner, the committee will give more consideration to the role and remit of the commissioner in chapter 4.

Criminal legislation

- 3.29** The *Crimes Act 1900* (NSW) contains a range of offences that may be applicable to serious invasions of privacy, depending on the circumstances of the case.
- 3.30** For example, several stakeholders, including Dr Nicola Henry, Dr Anastasia Powell and Dr Asher Flynn, the Public Interest Advocacy Centre and Women’s Legal Services NSW, referred to s 578C of the *Crimes Act*, which makes it an offence to publish an indecent article. The maximum penalty is 100 penalty units (\$1,100) and/or imprisonment for 12 months. The provision was used in response to a 2012 revenge pornography case, *Usmanov v R*, where the defendant posted six intimate photographs of his former partner, the complainant, to his Facebook page without her consent. He pleaded guilty in the Local Court and was sentenced to six months imprisonment, which on appeal was reduced to a six month suspended sentence.⁷⁴
- 3.31** The *Usmanov* case was the only New South Wales prosecution relating to a revenge pornography scenario that was raised by stakeholders during the inquiry. Indeed, the magistrate hearing the matter noted that it was the first application of the s 578C offence to such a scenario that she was aware of.⁷⁵
- 3.32** Notwithstanding the conviction and penalty, some stakeholders argued that s 578C was not necessarily an ideal way to respond to revenge pornography type scenarios. It was argued by Women’s Legal Services NSW that the language of ‘indecent’ used in the provision has the potential to result in victim blaming, rather than holding the offender accountable for what is the ‘real harm’ in such a scenario, being the non-consensual sharing of an intimate image:

It is questionable whether intimate sexual photos should be categorised as ‘indecent’ and what message this sends to the victim and the community. We hold concerns that framing intimate sexual images of the victim as ‘indecent’ encourages victim blaming and allows the perpetrator’s culpability to be minimised. Sharing the images without consent is the key wrong.⁷⁶

⁷⁴ *Usmanov v R* [2012] NSWDC 290.

⁷⁵ Submission 32, Women’s Legal Services NSW, p 16 referencing *Police v Ravshan Usmanov* [2011] NSWLC 40 at [10]–[11] (Magistrate Mottley).

⁷⁶ Submission 32, Women’s Legal Services NSW, p 16.

3.33 Drs Henry, Powell and Flynn, while acknowledging the successful prosecution of s 578C in *Usmanov*, similarly suggested that the offence may be ‘ill-suited’ to address revenge pornography type scenarios:

... the term “indecent” is highly problematic in cases of revenge pornography since it is defined in the Act as “contrary to the ordinary standards of respectable people in this community”, thus implying that it is the image itself that is indecent, not the actual act of distributing the image without consent. As such, this existing offence is ill-suited to addressing these behaviours.⁷⁷

3.34 Various other offences in the *Crimes Act* were noted by stakeholders as having potential application to serious invasions of privacy, including:

- s 545B, which prohibits ‘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’⁷⁸
- s 91J (voyeurism)
- s 91K (filming a person engaged in a private act)
- s 91L (filming a person’s private parts)
- s 91M (installing a device to facilitate observation or filming)
- s 192J (dealing with identification information)
- s 249K (blackmail)
- s 308H (unauthorised access to or modification of restricted data held in a computer).

3.35 Section 91H(2) of the *Crimes Act* creates an offence of possessing or disseminating a sexual image of a person under 16 years and criminalises the possession or dissemination of child abuse material or child pornography. It was noted during the inquiry that the section can also, in some instances, capture behaviour commonly referred to as ‘sexting’, conduct involving the sending of intimate images or videos by text message. Where children or young people engage in this conduct, which can occur in the context of consensual, albeit underage, relationships, they risk receiving criminal convictions and being listed on sex offender registers. The common scenario was described by Women’s Legal Services:

Many of the photos being sent by young girls are ‘selfies’ where they have sent sexually explicit photos of themselves to others (for example, boyfriends). Where this is the case, they themselves could be charged with an offence such as producing or disseminating child abuse material or distributing child pornography material.⁷⁹

3.36 A similar offence exists under the Commonwealth *Criminal Code Act 1995*,⁸⁰ however, unlike the New South Wales offence, it requires the consent of the Commonwealth Attorney

⁷⁷ Submission 13, Dr Nicola Henry, Dr Anastasia Powell and Dr Asher Flynn, p 5.

⁷⁸ Submission 9, Public Interest Advocacy Centre, p 8. See also Submission 26, NSW Council for Civil Liberties, p 7.

⁷⁹ Submission 32, Women’s Legal Services NSW, p 20.

⁸⁰ Part 10.6 of the *Criminal Code Act 1995* (Cth).

General before proceedings can be commenced against a person who was under 18 years at the time of the offence.⁸¹

3.37 Stakeholders also referred to offences provided by the *Crimes (Domestic and Personal Violence) Act 2007* (NSW), which may be applicable to some serious invasions of privacy.⁸² These offences include knowingly contravening an apprehended violence order⁸³ and stalking or harassment with the intention of causing fear of physical or mental harm.⁸⁴

3.38 Notwithstanding the range of existing criminal offences that could apply to some serious invasions of privacy, there was a widespread view that they failed to adequately respond to some of the more common scenarios where a person has their privacy impinged. In particular, stakeholders commented on the inadequacy of the criminal law in responding to revenge pornography (with the exception of the *Usmanov* case). For example, Drs Henry, Powell and Flynn said:

In relation to criminal laws in NSW, although revenge pornography can be charged as stalking, blackmail or voyeurism offences, these provisions are ill-suited to revenge pornography behaviours.⁸⁵

3.39 The Public Interest Advocacy Centre had a similar view:

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’.⁸⁶

3.40 Ms Sophie Farthing, Senior Policy Officer with the Public Interest Advocacy Centre, suggested that it would be appropriate for a specific criminal offence to be created to respond to issues around the dissemination of intimate images without the consent of the person, and with the intent to cause distress:

... in terms of looking at the lack of protection in criminal law ... our basic submission is that we certainly support the enactment of a criminal offence where there is intentional distribution of an intimate image with the intent to cause harm and emotional distress.⁸⁷

3.41 Women’s Legal Services NSW took a similar view in regards to criminalising the dissemination of intimate images, but otherwise suggested the issue lay with a failure to utilise existing offences to respond to technology-facilitated or assisted invasions of privacy:⁸⁸

⁸¹ Submission 29, Department of Justice, NSW Government, p 7.

⁸² Submission 29, Department of Justice, NSW Government pp 5-6. See also Submission 32, Women’s Legal Services NSW.

⁸³ *Crimes (Domestic and Personal Violence) Act 2007* (NSW), s 14.

⁸⁴ *Crimes (Domestic and Personal Violence) Act 2007* (NSW), s 13.

⁸⁵ Submission 13, Dr Nicola Henry, Dr Anastasia Powell and Dr Asher Flynn, p 5.

⁸⁶ Submission 9, Public Interest Advocacy Centre, p 9.

⁸⁷ Evidence, Ms Sophie Farthing, Senior Policy Officer, Public Interest Advocacy Centre 16 November 2015, p 44.

⁸⁸ Evidence, Ms Alexandra Davis, Solicitor, Women’s Legal Services NSW, 30 October 2015, p 44.

While some existing offences are broad enough to capture technology-facilitated stalking and abuse, we are not seeing them used. There are also gaps and deficiencies where the law has not yet caught up – for example, in relation to non-consensual sharing of intimate images.⁸⁹

3.42 A number of inquiry participants, including the NSW Privacy Commissioner, Dr Coombs, Dr Henry and representatives of Women’s Legal Services NSW, suggested that women subjected to this form of abuse would benefit from enhanced access to remedies that responded to the harm, such as take-down and deliver up orders. In that regard, Women’s Legal Services submitted that legislation governing apprehended violence orders, as well as any statutory tort for invasion of privacy (considered in the next chapter) should include provisions that allow for magistrates to grant this type of injunctive relief in a clear and simple way.⁹⁰

3.43 In addition, Ms Alexandra Davis, Solicitor, Women’s Legal Services NSW argued that there were various improvements that could be made to better support women experiencing this type of abuse. Police in New South Wales currently receive training in domestic and family violence and are supported in responding to these incidents through various specialist supports within the organisation, including the Domestic Violence Liaison Officer network, Domestic and Family Violence Team and Region and Corporate Sponsors for Domestic and Family Violence.⁹¹ However, Ms Davis advocated for police to be provided with additional training to assist them to better understand and investigate these types of matters, for better access to remedies including take-down orders, and for specialist services that could provide support to victims:

The second challenge is police attitudes and evidence-gathering capabilities. There is an urgent need for training to overcome the common attitude that technology-facilitated harassment is somehow less serious and less harmful than behaviours in person and that proving that the offender is responsible is somehow more burdensome when technology is involved. The third challenge is access to remedies and support. There is a need for a quick, accessible way of obtaining a take-down order. There is also a need for specialist services that are trained to assist women to access comprehensive planning for the safe use of technology and to remove spyware from devices.⁹²

3.44 Women’s Legal Services made a number of recommendations regarding a statutory review of the *Crimes (Domestic and Personal Violence) Act 2007* and apprehended violence orders. The organisation suggested:

8.4 Updated consultation on the statutory review of the Crimes (Domestic and Personal Violence) Act 2007 (NSW), including an exposure draft bill that contemplates the realities of technology-facilitated stalking and abuse.

⁸⁹ Evidence, Ms Davis, 30 October 2015, p 44.

⁹⁰ Submission 32, Women’s Legal Services NSW, p 2, pp 33-34.

⁹¹ Assistant Commissioner Mark Murdoch, NSW Police Force, *Introduction and Message from the Spokesperson*, http://www.police.nsw.gov.au/community_issues/domestic_and_family_violence/introduction

⁹² Evidence, Ms Davis, 30 October 2015, p 44.

8.5 Including an apprehended violence order (AVO) prohibiting the defendant from attempting to locate, asking someone else to locate, follow or keep the protected person under surveillance.

8.6 Including an AVO prohibiting the actual or threatened publishing or sharing of images or videos of the protected person of an intimate nature.

8.7 Including a provision allowing AVOs to be used for an injunctive order such as a take down order or deliver up order.⁹³

Surveillance legislation

3.45 There is also surveillance legislation that may also have application to some privacy invasion scenarios. For example, under the *Surveillance Devices Act 2007* (NSW) unauthorised audio recording without consent is a criminal offence. The Act does not, however, prevent video recording without consent.⁹⁴

3.46 The *Workplace Surveillance Act 2005* (NSW) and *Telecommunications (Interception) Act 1979* (Cth) also regulate, to some extent, the use of surveillance devices and telecommunications interceptions at a state and federal level.⁹⁵

3.47 Mr Kirk McKenzie, Chair of the Human Rights Committee at the Law Society of NSW Human Rights Committee expressed concern that the state's existing legislative framework does not regulate audio recording:

The surveillance devices Act of this Parliament, although it prohibits audio recording without consent, does not prevent video recording without consent. Although we did not address that issue in any great detail in our submission, it struck me, upon reading that submission, that it really is something of a problem.⁹⁶

3.48 The Law Society of NSW subsequently provided more information on the issue, referring to the work of the Victorian Law Reform Commission in a 2010 report on surveillance in public places. The commission recommended the enactment of a new offence prohibiting the use of surveillance devices to intimidate, demean or harass a person of ordinary sensibilities; or to prevent or hinder a person from performing an act they are lawfully entitled to do. It also recommended a civil and alternative criminal penalty for breaches of the offence.⁹⁷

3.49 The policy rationale behind the Victorian Law Reform Commission's recommendation was that:

⁹³ Submission 32, Womens' Legal Services, NSW, p 2.

⁹⁴ Evidence, Mr Kirk McKenzie, Chair, Human Rights Committee, Law Society of NSW, 30 October 2015, p 40.

⁹⁵ *Surveillance Devices Act 2007* (NSW); *Workplace Surveillance Act 2005* (NSW); *Telecommunications (Interception) Act 1979* (Cth).

⁹⁶ Evidence, Mr McKenzie, 30 October 2015, p 30.

⁹⁷ Victorian Law Reform Commission, *Final Report into surveillance in public places*, 1 June 2010 (hereafter referred to as 'VLRC 2010 Report'), p 125 (Recommendations 20 and 21) cited in Answers to questions on notice, Mr JF Eades, President, NSW Law Society, 18 November 2015, p 2.

The primary purpose of such a new offence would be to send a clear message to the community that various forms of behaviour with a surveillance device are unacceptable.⁹⁸

- 3.50** The Law Society's Human Rights Committee supported the view of the Victorian Law Reform Commission, and considered that 'at a minimum, the use of fixed video surveillance devices should be regulated by statute'.⁹⁹

Committee comment

- 3.51** The committee recognises that a number of criminal offences currently on the New South Wales statute books may have application to some forms of serious invasions of privacy. However, we note the evidence that the available offences fail to cover some key types of privacy invasions, particularly the 'revenge pornography' type scenarios.
- 3.52** The committee acknowledges the support from a number of inquiry participants for a new criminal offence of taking and disseminating intimate images without consent, or threatening to do so. However, the committee's remit for this inquiry was to consider the adequacy of existing remedies for serious invasions of privacy, rather than to consider the introduction of new criminal offences.
- 3.53** Further, we note that there is a Criminal Code Amendment (Private Sexual Material) Bill 2015 currently before the Australian Parliament (discussed further at 3.113) which, if passed, will make revenge pornography a federal criminal offence.
- 3.54** The committee notes that the Senate Legal and Constitutional Affairs Reference Committee recently made recommendations for the introduction of criminal offences at a federal level as well as in the states and territories, specifically to address non-consensual sharing of intimate images. Recommendations 2 and 3 of the Senate committee's report state:

Recommendation 2

5.18 Taking into account the definitional issues discussed in this report, the committee recommends that the Commonwealth government legislate, to the extent of its constitutional power and in conjunction with state and territory legislation, offences for:

- knowingly or recklessly recording an intimate image without consent;
- knowingly or recklessly sharing intimate images without consent; and
- threatening to take and/or share intimate images without consent, irrespective of whether or not those images exist.¹⁰⁰

Recommendation 3

The committee recommends that the states and territories enact legislation with offences the same or substantially similar to those outlined in Recommendation 2, taking into account relevant offences enacted by the Commonwealth government.¹⁰¹

⁹⁸ VLRC 2010 Report, p 122 cited in Answers to questions on notice, Mr JF Eades, 18 November 2015, p 2.

⁹⁹ Answers to questions on notice, Mr JF Eades, 18 November 2015, p 1.

¹⁰⁰ Recommendations 2, Senate Legal and Constitutional Affairs References Committee, Parliament of Australia (2016) *Phenomenon colloquially referred to as 'revenge porn'*.

- 3.55** We note the above report. It would be appropriate for the NSW Government to consider the Senate Committee's recommendations.
- 3.56** A civil response to the taking and disseminating intimate images without consent will be captured in chapter 4 under the broader question of whether there is a need for a statutory cause of action to provide adequate remedies for such invasions.
- 3.57** In regard to police responses to technology-facilitated stalking, abuse and harassment, the committee agrees with the suggestion of Women's Legal Services that better training and resourcing is needed in this area. We understand that all police receive training in domestic and family violence however, the committee considers that there is room for further development of officers in responding specifically to allegations of this nature.
-

Recommendation 1

That the NSW Police Force:

- a) ensure that its officers receive training in the harms associated with technology-facilitated stalking, abuse and harassment; and
 - b) that the training incorporate education about how existing offences and other orders, such as apprehended violence orders, could be used in respect of allegations of that nature.
-

- 3.58** The committee believes there is merit in the Women's Legal Services NSW submission that the Government undertake a statutory review of the *Crimes (Domestic and Personal Violence) Act 2007*. This review should consider the benefits of including in the potential orders available to a local court in proceedings under the Act including take down orders and prohibitions on threatening or publishing or sharing of images or videos of an intimate nature.
-

Recommendation 2

That the NSW Government undertake a statutory review of the *Crimes (Domestic and Personal Violence) Act 2007* to consider additional potential remedies available to the Local Court to protect the privacy of individuals who have been or are seeking to be safeguarded by apprehended domestic violence orders.

- 3.59** In regard to surveillance legislation, the committee considers that there is a gap in the framework regulating video recording, and notes the comments of the NSW Law Society and the work of the Victorian Law Reform Commission.
- 3.60** However, given the limited evidence received the committee does not have sufficient information to make a recommendation regarding legislative reform in this area.
-

¹⁰¹ Recommendations 3, Senate Legal and Constitutional Affairs References Committee, Parliament of Australia (2016) *Phenomenon colloquially referred to as 'revenge porn'*.

Common law actions and remedies

3.61 There is currently no common law tort in Australia specifically designed to protect privacy. However, there are a number of common law actions which may have application to some serious invasions of privacy. For example, the committee heard that the common law actions of trespass, nuisance, defamation, passing off, malicious falsehood and contempt were some options which *may* be available to victims of such invasions.¹⁰²

3.62 Members of the arts community and representatives of the media argued that torts such as nuisance and trespass provide adequate means for people to seek redress for serious invasions of privacy.¹⁰³

3.63 However, the ALRC considered that there were ‘several gaps and inconsistencies in existing [common law] legal protection that may amount to an invasion of privacy’.¹⁰⁴ This view was echoed by other inquiry participants.¹⁰⁵ The ALRC stated:

The tort actions of trespass to the person, trespass to land and nuisance do not provide protection from unauthorised and serious intrusions into a person’s private activities in many situations. Trespass to the person requires bodily contact or a threat of such contact. Trespass to land and nuisance protect only the occupier of the land and the former requires an intrusion onto the land.

In many tortious actions – aside from trespass, malicious prosecution and defamation – there is no remedy for the intentional infliction of emotional distress that does not amount to a psychiatric illness.¹⁰⁶

3.64 The Australian Lawyers Alliance noted that the actions of trespass to land and nuisance had been used in respect of factual scenarios involving freedom from intrusion, but that there were limitations to how far they would go in protecting privacy. In relation to trespass, the Alliance commented:

The trespass action was used successfully against a television crew in *Lincoln Hunt v Willesee*. But it would not be available to those who filmed or were otherwise subjected to surveillance from outside the property boundary.¹⁰⁷

3.65 Although there is currently no common law privacy tort in Australia, the High Court left open the development of such a tort in the case of *ABC v Lenah Game Meats*. That case is discussed in more detail in the following section in the context of the equitable action of breach of

¹⁰² Submission 4, Australian Law Reform Commission, p 4; Submission 31, NSW Privacy Commissioner p 11; Submission 11, Arts Law Center of Australia, p 6; Submission 20, Free TV Australia, p 10; Submission 30, Dr Normann Witzleb, p 2.

¹⁰³ Evidence, Ms Robyn Ayres, Executive Director, Arts Law Centre of Australia, 16 November 2015, pp 3-4; Evidence, Ms Sarah Waladan, Manager, Media Policy and Regulatory Affairs, Free TV Australia, 16 November 2015, pp 11-12.

¹⁰⁴ Submission 4, Australian Law Reform Commission, p 2.

¹⁰⁵ See, for example, Submission 10, Australian Lawyers Alliance, pp 4-5; Submission 31, Dr Elizabeth Coombs, NSW Privacy Commissioner, p 11.

¹⁰⁶ Submission 4, Australian Law Reform Commission, p 2.

¹⁰⁷ Submission 10, Australian Lawyers Alliance, p 4.

confidence, which has been described as ‘the main avenue of protecting privacy [in Australia]’.¹⁰⁸

Equitable action of breach of confidence

- 3.66** The committee was specifically tasked, through its terms of reference, with examining the adequacy of the equitable action of breach of confidence in remedying serious invasions of privacy.
- 3.67** Breach of confidence actions are intended to protect individuals from the unauthorised disclosure of confidential information.¹⁰⁹ The equitable action:
- ... 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 [or ought to have been aware], is communicated to a third party.¹¹⁰
- 3.68** Breach of confidence has traditionally been applied to contractual or commercial relationships. In those relationships, where a contract implies that particular information is confidential in nature and that information is subsequently disclosed, the affected party can not only bring an action for breach of contract, but can pursue an equitable action for breach of confidence.
- 3.69** The obligation of confidence in breach of confidence requires three elements. First, that the information must have the necessary quality of confidence about it. Second, that the information must have been imparted in circumstances importing an obligation of confidence. And third, that there must be an unauthorised use of that information to the detriment of the party communicating it.¹¹¹
- 3.70** In some common law jurisdictions, particularly in the United Kingdom, courts have interpreted the second limb of the obligation broadly, so that the requirement for a pre-existing relationship (which generally exists in contractual and commercial relationships, but does not always in intimate or personal relationships) is no longer necessary to found an action for breach of confidence.¹¹² The NSW Young Lawyers Communications, Entertainment and Technology Committee (CET Committee) referred to the 2004 case of *Campbell v MGN Ltd*, involving supermodel Naomi Campbell and UK print publication *The Mirror*. In that case (which is discussed in more detail at paragraphs 3.90 - 3.92), Lord Nicholls opined that:

¹⁰⁸ Submission 30, Dr Normann Witzleb, Attachment 8, p 80.

¹⁰⁹ Submission 5, Mr Seppy Pour, p 9.

¹¹⁰ Submission 9, Public Interest Advocacy Centre, p 6.

¹¹¹ Submission 25, NSW Young Lawyers Communications, Entertainment and Technology Committee, p 3, quoting *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, 47.

¹¹² Submission 25, NSW Young Lawyers Communications, Entertainment and Technology Committee, pp 3-4.

[A] ‘duty of confidence’ can be owed whenever a person ‘receives information he knows or ought to know is fairly and reasonably to be regarded as confidential’.¹¹³

3.71 It has been suggested that there is ‘uncertainty’ around how strictly the second element of the breach of confidence action applies in Australia, because:

... the circumstances in which equity may impose such an obligation are not sufficiently clear. Some of the most serious invasions of privacy, including the taking of intimate photographs, could foreseeably involve no pre-existing relationship.¹¹⁴

3.72 Remedies available in breach of confidence actions include injunctions (to prevent publication of information for example), an account of profits and compensation.¹¹⁵ A number of inquiry participants, including the ALRC, Dr Witzleb and the CET Committee noted that, with the exception of a couple of recent cases (discussed below), the approach in Australia has been that emotional distress was not compensable under this action. In many cases involving a serious invasion of privacy the plaintiff is unlikely to suffer economic loss (which is compensable) and, while suffering shame, emotional distress or mental harm, would struggle to meet the required threshold of psychiatric injury to enable the court to award compensation.¹¹⁶

3.73 The Public Interest Advocacy Centre observed that the uncertainty of remedies in breach of confidence actions is a major issue in utilising the action for serious invasions of privacy:

... 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.¹¹⁷

Development of breach of confidence in Australia

3.74 The action of breach of confidence was considered by the High Court in the 2001 case of *Lenah*. The facts of the case were that unknown people unlawfully entered a meat processing plant operated by Lenah Game Meats and installed hidden cameras without consent or knowledge of the operator. The footage captured depicted the slaughtering process of possums at the plant. The footage was supplied to an animal rights organisation, which provided it to media organisation ABC. Lenah, having become aware of the ABC’s plans to broadcast the footage, sought an interlocutory injunction to prevent the broadcast.

¹¹³ Submission 25, NSW Young Lawyers Communications, Entertainment and Technology Committee, p 3, quoting *Campbell v MGN Ltd* [2004] 2 AC 457 at 464-5.

¹¹⁴ Submission 25, NSW Young Lawyers Communications, Entertainment and Technology Committee, p 4.

¹¹⁵ Submission 25, NSW Young Lawyers Communications, Entertainment and Technology Committee, p 4; Submission 30, Dr Normann Witzleb, p 3.

¹¹⁶ Submission 4, Australian Law Reform Commission, p 3; Submission 30, Attachment 1, Dr Normann Witzleb, pp 18-20; Submission 25, NSW Young Lawyers Communications, Entertainment and Technology Committee, p 5. See also, Submission 9, Public Interest Legal Centre, p 16.

¹¹⁷ Submission 9, Public Interest Advocacy Centre, p 6.

3.75 Lenah argued three grounds: first that the slaughtering operations were confidential and broadcasting of the footage would amount to a breach of confidence. Second, that as the footage was obtained unlawfully (because unknown persons committed trespass to install the cameras) and that act was unconscionable, the court should prevent broadcast. Third, that broadcasting of the footage would amount to an invasion of Lenah's privacy.

3.76 The court considered that, in those circumstances, the equitable action of breach of confidence did not apply because the act filmed (i.e. the slaughtering process) was not innately private. Gleeson CJ held that the filming of such activities on private property does not deem the act filmed as private:

I regard the law of breach of confidence as providing a remedy, in a case such as the present, *if* the nature of the information obtained by the trespasser is such as to permit the information to be regarded as confidential. *But, if that condition is not fulfilled, then the circumstance that the information was tortiously obtained in the first place is not sufficient to make it unconscientious of a person into whose hands that information later comes to use it or publish it* [Empasis added].¹¹⁸

3.77 The court went on to deny the grounds of unconscionability and invasion of privacy.

3.78 There have been only two cases in Australia that have seen the equitable action of breach of confidence used successfully in response to an invasion of privacy that the committee is aware of. The most recent is the 2015 Western Australian case of *Wilson v Ferguson*, which drew on the decision of the 2008 Victorian Court of Appeal decision, *Giller v Procopets*, and is discussed below.

Case study *Wilson v Ferguson* [2015] WASC 15

The facts

The plaintiff (Ms Wilson) and the defendant (Mr Ferguson) worked as fly-in fly-out workers at the Cloudbreak Mine in Western Australia, and had commenced a relationship together.

During the course of their relationship they had exchanged photographs and videos with each other of themselves which were of a sexual and intimate nature using their mobile phones. On one occasion the defendant accessed the plaintiff's phone without her consent and emailed himself videos of the plaintiff engaging in sexual activity. The plaintiff gave evidence at trial of an understanding with the defendant (reiterated by text messages from her to the defendant to this effect) that the photographs and videos were to remain private between them and other people would not see them.

The relationship broke down and the plaintiff informed the defendant she did not want to see him again. The defendant subsequently posted 16 of the explicit photographs and two videos showing the plaintiff on his Facebook page, making them available to his approximately 300 Facebook friends, many of whom worked at Cloudbreak with the plaintiff. The defendant sent two text messages to the plaintiff referring to the Facebook posts, one of which included the sentence: 'Can't wait to watch u fold as a human being'.

¹¹⁸ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 per Gleeson CJ at 55. See also Submission 9, Public Interest Advocacy Centre, p 6.

The plaintiff also received telephone calls and text messages from friends alerting her to the defendant's Facebook posts. The plaintiff sent a series of text messages to the defendant begging him to remove the photographs and videos. Later that day the defendant removed them from his Facebook page.

Evidence from a co-worker was given at trial of the photographs and videos having been viewed and widely discussed by a significant number of the plaintiff's co-workers at Cloudbreak.

Breach of confidence

The Western Australian Supreme Court found the defendant's conduct in posting the photographs and videos of the plaintiff to his Facebook page was a breach of his equitable obligation to the plaintiff due to the confidential nature of the images, the circumstances in which they were obtained (some without consent) and their unauthorised disclosure to others by the defendant.

Remedies

An injunction was granted prohibiting the defendant from publishing photographs or videos of the same nature. The plaintiff also sought equitable relief for the impact upon her of the publication of the images. The plaintiff gave evidence that she suffered humiliation, distress, anxiety, difficulty sleeping, and that she had taken time off work without pay and undergone counselling.

The court considered whether equitable compensation could be awarded to a plaintiff for non-economic loss comprising embarrassment and distress caused by disclosure of private images in breach of an equitable obligation of confidence. It was noted that damages for emotional distress falling short of a recognised psychiatric or psychological injury are available only in very limited circumstances and that equitable compensation in Australian cases had, until recently, only been awarded to compensate for economic loss.

The court had regard to an earlier decision of the Victorian Court of Appeal in *Giller v Procopets* [2008] VSCA 236 where publication of a videotape depicting sexual activity amounted to a breach of confidence. Mitchell J referred to technological advances since that have:

... dramatically increased the ease and speed with which communications and images may be disseminated to the world... The process of capturing and disseminating an image to a broad audience can now take place over a matter of seconds by a few finger swipes of a mobile phone ... In many cases, such as the present, there will be no opportunity for any injunctive relief between the time when a defendant forms the intention to distribute the images of a plaintiff and the time when he or she achieves that purpose.¹¹⁹

The court agreed with the decision in *Giller* that the equitable doctrine of breach of confidence should be developed by extending the relief available for the unlawful disclosure of confidential information to include monetary compensation for embarrassment and distress resulting from the disclosure of information (including images) of a private and personal nature.

¹¹⁹ *Wilson v Ferguson* [2015] WASC 15 at [80].

Damages

The court awarded the plaintiff \$35,000 for her significant embarrassment, anxiety and distress, in addition to \$13,404 for economic loss on the basis that the plaintiff felt unable to return to work after the incident and took unpaid leave. Mitchell J noted that the impact of the disclosure on the plaintiff was aggravated by the fact the release of the images was an act of retribution by the defendant, and he intended to cause harm to the plaintiff.

Adequacy of breach of confidence action

3.79 Some stakeholders argued that the fact that the plaintiffs in *Giller* and *Ferguson* were able to achieve redress for non-economic loss relating to a technology-facilitated invasion of privacy through the equitable action for breach of confidence demonstrated that the common law can adequately remedy such invasions. For example, the Arts Law Centre of Australia stated:

[*Wilson v Ferguson*] ... illustrates the adequacy of the equitable action of breach of confidence and its adaptability to new technological developments facilitating serious invasions of privacy.¹²⁰

3.80 However, notwithstanding these cases, a number of other stakeholders considered that the action has not developed enough to be a reliable source of remedy, and that waiting for the common law to develop further in relation to a privacy tort was undesirable.¹²¹

3.81 Further (and again notwithstanding *Giller* and *Wilson*), Mr Stephen Blanks, President of the NSW Council for Civil Liberties submitted that the equitable action of breach of confidence is not well crafted to respond to broader public interest matters, given that it traditionally applies in commercial contexts where obligations of confidence arise.¹²²

3.82 Mr Edward Santow, Chief Executive Officer of the Public Interest Advocacy Centre, reflecting on the inadequacy of privacy protections in New South Wales, also expressed doubt about the suitability of breach of confidence actions for remedying invasions of this nature:

... there is not a well-developed privacy tort that exists. Instead, what tends to happen at the moment is that individuals try to fit square pegs in round holes and will use other causes of action such as breach of confidence in a situation where fundamentally the concern is a breach of privacy.¹²³

¹²⁰ Submission 11, Arts Law Centre of Australia, p 3. See also Submission 20, Free TV Australia, p 1; Submission 22, Joint Media Organisations, p 4.

¹²¹ See, for example, Evidence, Ms Hanna Ryan, Vice President, NSW Council for Civil Liberties, 30 October 2015, p 15; Evidence, Professor Barbara McDonald, Australian Law Reform Commission, 30 October 2015, p 20.

¹²² Evidence, Mr Stephen Blanks, President, NSW Council for Civil Liberties, 30 October 2015, p 16. For detail on cases, see Answers to questions on notice, NSW Council for Civil Liberties, 26 November 2015, pp 4-5.

¹²³ Evidence, Mr Edward Santow, Chief Executive Officer, Public Interest Advocacy Centre, 16 November 2015, p 46.

- 3.83** Dr Witzleb made a similar point, arguing that existing civil remedies, including breach of confidence, were designed to protect other interests, and that the protection they offered in respect of privacy was ‘incidental’ and often a poor fit:

At present, the right to privacy is only protected incidentally, when the invasion of privacy can be shoehorned into an existing cause of action. Civil wrongs that can provide incidental protection to privacy interests, although they are primarily designed to protect other legal interests, include trespass to the person, trespass to land, nuisance, defamation and the equitable cause of action for breach of confidence.¹²⁴

Committee comment

- 3.84** The committee acknowledges that there are a range of common law actions currently available in New South Wales, such as nuisance, trespass and defamation, which may enable a response to some serious invasions of privacy. However, we also acknowledge the evidence that there are gaps and inconsistencies in the existing common law protections that fail to address other invasions of privacy, and note that there is currently no common law tort in Australia to protect privacy.
- 3.85** In regard to the adequacy of the equitable action of breach of confidence, which the committee was specifically tasked with examining, we note that the action was successfully used in the cases of *Giller* and *Wilson* in to provide compensation for distress arising as a result of revenge pornography. The committee is of the view that the precedents established by those cases in awarding compensation for non-economic loss in technology-facilitated invasions of privacy are a promising step in the right direction toward the provision of an appropriate remedy in this area. At the same time however, given the evidence received regarding the ‘poor fit’ of this action to breaches of privacy due to it traditionally being applied to contractual or commercial relationships, and the fact that there has been little to no development of the common law in New South Wales, the committee believes that more needs to be done now to better protect and remedy serious breaches of privacy in New South Wales. As will be seen in chapter 4, we recommend that this be achieved through the introduction of a statutory cause action.

Approaches in other jurisdictions

- 3.86** This section considers the approaches in other Australian jurisdictions, as well as comparable jurisdictions internationally, that have moved toward providing for a cause of action for serious invasions of privacy.

United Kingdom

- 3.87** The United Kingdom has been a leader in terms of recognising the right to protection of personal privacy and the subsequent need to provide an adequate legal response to invasions of it. This is attributable to two key factors.
- 3.88** First, in 1998 the United Kingdom enacted the *Human Rights Act 1998* (HRA), which effectively incorporated the *European Convention on Human Rights* (ECHR) into domestic law.

¹²⁴ Submission 30, Dr Normann Witzleb, p 2.

The enactment of the HRA has been described as a ‘watershed moment for the development of privacy protection in the UK’.¹²⁵

- 3.89** The second factor builds upon the first, in that the HRA required all public authorities to ‘act compatibly with every individual’s right to respect for his or her private life’.¹²⁶ But perhaps more critically:

[The HRA and the ECHR mean that] the courts are now mandated to develop the common law in a way that gives equal effect to both Art. 8 of the European Convention on Human Rights (the protection of private life) and its Art. 10 (the protection of freedom of speech).¹²⁷

- 3.90** The UK courts have ‘keenly embraced’ the application of the HRA and the ECHR through the equitable action of breach of confidence, which was developed significantly as a result of the case of *Campbell v MGN Ltd* [2004] 2 AC 457. The facts in that case were that supermodel Naomi Campbell was photographed leaving a Narcotics Anonymous meeting in London. The Mirror subsequently published the images, under the headline ‘Naomi: I’m a drug addict’, and the article contained detailed information relating to Ms Campbell’s treatment for addiction. Ms Campbell claimed damages, among other things, breach of confidentiality.

- 3.91** The House of Lords in *Campbell* recognised a distinct cause of action for ‘misuse of personal information’. The decision:

... removed the protection of privacy from the shackles of the equitable doctrine of breach of confidence and effectively created a common law right to privacy.¹²⁸

- 3.92** The result has been described as developing the UK ‘from a laggard in privacy protection to a jurisdiction that not only matches European standards but can now also claim to have the most vigorous public and legal discourse on privacy rights’.¹²⁹

- 3.93** In summary, the United Kingdom has not enacted a statutory cause of action for serious invasions of privacy because the common law equitable action relating to breach of confidence has developed in such a way as to provide for an adequate remedy to claimants:

In contrast to the traditional action for breach of confidence, a claimant [in the UK] now no longer needs to prove that the defendant received the information in circumstances importing an obligation of confidence. It is the quality of the

¹²⁵ Submission 30, Dr Normann Witzleb, Attachment 3 - Normann Witzleb, David Lindsay, Moira Paterson, Sharon Rodrick (eds) *Emerging Challenges in Privacy Law: Comparative Perspectives*, Cambridge University Press 2014 (in production), p 4.

¹²⁶ Submission 30, Attachment 3 - Normann Witzleb, David Lindsay, Moira Paterson, Sharon Rodrick (eds) *Emerging Challenges in Privacy Law: Comparative Perspectives*, p 4.

¹²⁷ Submission 30, Dr Normann Witzleb, p 6.

¹²⁸ Submission 30, Attachment 3 - Normann Witzleb, David Lindsay, Moira Paterson, Sharon Rodrick (eds) *Emerging Challenges in Privacy Law: Comparative Perspectives*, p 1.

¹²⁹ Submission 30, Attachment 3 - Normann Witzleb, David Lindsay, Moira Paterson, Sharon Rodrick (eds) *Emerging Challenges in Privacy Law: Comparative Perspectives*, p 1.

information as private, rather than the character of the relationship between the parties, that is now determinative.¹³⁰

New Zealand

- 3.94** The law in New Zealand has also developed on the back of a human rights framework, although the *Bill of Rights Act 1990* does not provide for an express ‘right to privacy’. It does, however, provide an express right to freedom of expression.¹³¹
- 3.95** Developments through New Zealand common law have seen the creation of a privacy tort, with protection extending to breaches of privacy that involve publicising private and personal information, and for intrusion upon seclusion.¹³²
- 3.96** In the 2004 case of *Hosking v Runting*, the Court of Appeal defined the action relating to publicising private information through the cumulative application of two criteria: first that the plaintiff had a reasonable expectation of privacy, and second that the publication would be ‘highly offensive’ to a reasonable person.
- 3.97** However, since *Hosking*, which succeeded with a ‘bare majority’ of the court, members of the NZ Supreme Court have ‘cast doubt on this development’.¹³³
- 3.98** The law was further developed in the 2012 case of *C v Holland*, where the plaintiff was subject to surreptitious filming by a housemate who installed a camera in the bathroom and recorded footage while she undressed and showered. There was no subsequent disclosure of the footage. In that case, the High Court defined the elements of the tort of intrusion upon seclusion as that the defendant had intruded into the plaintiff’s solitude and seclusion; infringed a reasonable expectation of privacy, and that his act was highly offensive to a reasonable person.¹³⁴
- 3.99** In its submission to this inquiry, the ALRC noted that there had been inquiries into privacy protection in New Zealand (and the United Kingdom) which recommended *against* the introduction of a statutory cause of action to remedy invasions of this nature.¹³⁵ However, it advised that those recommendations ‘must be seen in light of the significant and recent developments in the common law in those two countries’.¹³⁶

¹³⁰ Submission 30, Attachment 3 - Normann Witzleb, David Lindsay, Moira Paterson, Sharon Rodrick (eds) *Emerging Challenges in Privacy Law: Comparative Perspectives*, p 6.

¹³¹ Cl 14, *New Zealand Bill of Rights Act 1990*.

¹³² *Hosking v Runting* [2004] NZCA 34; *C v Holland* [2012] 3 NZLR 277 respectively. Intrusion upon seclusion generally refers to invasions or intrusions into a person’s private physical space.

¹³³ *Television New Zealand Ltd v Rogers* [2007] NZSC 91; [2008] 2 NZLR 277 at [177] per Anderson J; [25] per Elias CJ cited in Submission 30, Dr Normann Witzlebb, Attachment 7, p 105.

¹³⁴ Submission 25, NSW Young Lawyers, Communications, Entertainment & Technology Law Committee, p 13 quoting Whata J at [6]-[7] in *C v Holland* [2012] 3 NZLR 277.

¹³⁵ Joint Committee on Privacy and Injunctions, *Privacy and Injunctions*, House of Lords Paper No 273, House of Commons Paper No 1443, Session 2010–12 (2012); New Zealand Law Commission, *Invasion of Privacy: Penalties and Remedies: Review of the Law of Privacy Stage 3*, Report No 113 (2010) cited in ALRC 2014 Report, p 22.

¹³⁶ ALRC 2014 Report, p 22.

Canada

- 3.100** Privacy is protected in Canada through a range of mechanisms. Of particular relevance to this inquiry is that four of its provinces have legislated for statutory torts for invasion of privacy.¹³⁷
- 3.101** The Communications, Entertainment & Technology Law Committee of NSW Young Lawyers (CET Committee) noted that these torts are ‘actionable without proof of damage, for a person to wilfully and without claim of right, to violate the privacy of another person’.¹³⁸ The CET Committee noted that remedies available for these statutory torts include damages, injunctions, account for profits, or delivery of documents. Defences include consent, lawful authority, and in the case of publication, public interest, fair comment or privilege under defamation law.¹³⁹
- 3.102** The former President of the ALRC, Professor Barbara McDonald, expressed the view that the statutory torts enacted in the Canadian provinces had been ‘quite effective’. She noted that despite concern from the media and others, the introduction of statutory privacy torts in Canada had not opened the floodgates to litigation.¹⁴⁰
- 3.103** In addition, Canada has privacy protections through various pieces of legislation,¹⁴¹ the *Canadian Charter of Rights and Freedoms* (which applies only to government),¹⁴² and the common law (*Jones v Tsige*¹⁴³ and *Jane Doe 464533 v N.D.*¹⁴⁴). In what is believed to be the first case of its kind in Canada, the 2016 *Jane Doe* decision held a man financially liable for posting a private sex tape of a former girlfriend online. The ‘revenge pornography’ claim resulted in a total award of \$141,708.03, including the maximum damages available in the jurisdiction of \$100,000, incorporating general damages of \$50,000, and aggravated and punitive damages of \$25,000 each respectively.¹⁴⁵ Like the NZ *Bill of Rights*, the Canadian Charter does not contain an express right to privacy, however s 7 (‘right to life, liberty, and security of the person’) and s

¹³⁷ These are British Columbia, Manitoba, Newfoundland and Labrador, Quebec and Saskatchewan – see Submission 25, NSW Young Lawyers, Communications, Entertainment & Technology Law Committee, p 11.

¹³⁸ Submission 25, NSW Young Lawyers, Communications, Entertainment & Technology Law Committee, p 12, quoting *Privacy Act*, RSC 1996, c 373, s 1(1); *Privacy Act*, RSS 1978, c P-24, s 2; *Privacy Act*, RSNL 1990, c P-22, s 3(1). Manitoba’s statute uses the language of “substantially, unreasonably and without claim of right”: *Privacy Act*, CCSM, c P125, s 2(1).

¹³⁹ Submission 25, NSW Young Lawyers, Communications, Entertainment & Technology Law Committee, p 12.

¹⁴⁰ Evidence, Professor Barbara McDonald, Professor, Faculty of Law, University of Sydney, 30 October 2015, p 24.

¹⁴¹ Submission 25, NSW Young Lawyers, Communications, Entertainment & Technology Law Committee, p 13, quoting *Privacy Act*, RSC 1985, c P-21; *Access to Information Act*, RSC 1985, c A-1; these statutes address collection, use and disclosure of personal information by government agencies and rights of access to personal information held by government organisations.

¹⁴² Submission 25, NSW Young Lawyers, Communications, Entertainment & Technology Law Committee, p 13, quoting *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act 1982*, Sch B to the *Canada Act 1982* (UK) 1982, c 11.

¹⁴³ (2012) 108 OR (3rd) 241.

¹⁴⁴ *Doe 464533 v N.D.*, 2016 ONSC 541.

¹⁴⁵ *Doe 464533 v N.D.*, 2016 ONSC 541.

8 (‘the right to be secure against unreasonable search or seizure’) have been applied to protect ‘reasonable expectations of privacy’.¹⁴⁶

- 3.104** The CET Committee noted that in addition to these protections, the Commissioner of Canada investigates complaints of potential breaches of privacy and makes recommendations in relation to internet privacy.¹⁴⁷

Revenge pornography offences

- 3.105** As noted earlier in this chapter, New South Wales does not have specific offences targeting revenge pornography type conduct. However, a number of jurisdictions outside New South Wales have enacted criminal offences specifically designed to target this type of behaviour.
- 3.106** South Australia was the first Australian jurisdiction to enact a specific offence to respond to such conduct. In 2013, the *Summary Offences (Filming Offences) Amendment Act 2013* (SA) created s 26C, ‘distribution of an invasive image’, into the *Summary Offences Act 1953* (SA).
- 3.107** Section 26C provides that a person commits an offence if they distribute an invasive image of another person, knowing or having reason to believe that the other person does not consent to the distribution of the image. A maximum penalty of \$10,000 or two years imprisonment applies.¹⁴⁸
- 3.108** ‘Invasive image’ is defined in the Act as a moving or still image of a person (a) engaged in a private act; or (b) in a state of undress such that the person’s bare genital or anal region is visible, but does not include an image of a person under, or apparently under, the age of 16 years or an image of a person who is in a public place.¹⁴⁹
- 3.109** The South Australian offence is restricted only to circumstances where distribution has occurred and would not capture, for example, threats to distribute such material.
- 3.110** In 2014, Victoria created an offence of maliciously distributing, or threatening to distribute, intimate images without consent.¹⁵⁰ ‘Intimate image’ is defined as a moving or still image that depicts (a) a person engaged in sexual activity; (b) a person in a manner or context that is sexual; or (c) the genital or anal region of a person or, in the case of a female, the breasts.¹⁵¹
- 3.111** Since 2007, Victoria has also had offences that criminalise the intentional observation, using a device, of a person’s genital or anal region, or to intentionally visually capture the same region,

¹⁴⁶ Submission 25, NSW Young Lawyers, Communications, Entertainment & Technology Law Committee, p 12 quoting *R v O’Connor* [1995] 4 SCR 411, (1995) DLR (4th) 235, *Hunter v Southam Inc* [1984] 2 SCR 145.

¹⁴⁷ Submission 25, NSW Young Lawyers, Communications, Entertainment & Technology Law Committee, p 11.

¹⁴⁸ *Summary Offences Act 1953* (SA), s 26C(1).

¹⁴⁹ *Summary Offences Act 1953* (SA), s 26A.

¹⁵⁰ *Summary Offences Act 1966* (Vic), ss 41DA and 41DB respectively.

¹⁵¹ *Summary Offences Act 1966* (Vic), s 40.

in circumstances where it would be reasonable for that person to expect that they could not be observed in this way. An additional offence is available for the distribution of such images.¹⁵²

3.112 There are some offences available under Commonwealth legislation, including section 474.17 of the *Criminal Code Act 1995*, which criminalises menacing, harassing or offensive behaviour via carriage services. The offence carries a maximum three year sentence.

3.113 As mentioned earlier in this chapter, at the federal level there is a Criminal Code Amendment (Private Sexual Material) Bill 2015 currently before the Australian Parliament that is designed to respond to the issue of revenge pornography. Three rationales are outlined in the second reading speech for the introduction of the federal offences, which relate directly to the South Australian and Victorian offences. First, it is asserted that the existing state laws are ‘too broad in scope to directly target revenge porn’. Second, it is said that ‘they are not being used by law enforcement agencies or the courts to stamp out the prevalence of revenge porn’. Finally it is suggested that they ‘fail to send a clear message to the broader community that the sharing of private sexual images without the subject’s consent is not just wrong but is prohibited by law’.¹⁵³

3.114 The federal bill proposes the introduction of three new telecommunications offences:

- sharing private sexual material of a person without their consent where it will cause them distress or harm
- making a threat to another person to share private sexual material that they are depicted in, or another person that they care about it depicted in
- engaging in the above two offences for the purpose of obtaining a benefit.¹⁵⁴

3.115 ‘Private sexual material’ is defined as material depicting someone engaged in, or appearing to be engaged in, a sexual pose or sexual activity; or a sexual organ or anal region of a person or the breasts of a female person.¹⁵⁵ It does not cover material that has been altered where the alteration is what defines it as ‘private sexual material’, or where the alteration is what depicts the subject person.

3.116 The bill is yet to be considered by the Parliament, but the Federal Minister for Women, the Hon Michaelia Cash MP, has been reported as stating that the issue of technology-related abuse, including revenge pornography, is on the government’s agenda and that following agreement by the Council of Australian Governments, a review of Commonwealth, state and territory legislation is being undertaken ‘to ensure it adequately criminalises the distribution of intimate material ... without the victim's consent’.¹⁵⁶

¹⁵² *Summary Offences Act 1966* (Vic), ss 41A, 41B and 41C respectively.

¹⁵³ *Hansard*, Australian House of Representatives, 12 October 2015, p 10694 (Tim Watts).

¹⁵⁴ Criminal Code Amendment (Private Sexual Material) Bill 2015 (Cth), ss 474.24E, 474.24F and 474.24G.

¹⁵⁵ Criminal Code Amendment (Private Sexual Material) Bill 2015 (Cth), ss 474.24D.

¹⁵⁶ Jorge Branco, *Revenge porn laws needed 'sooner rather than later'*, 7 February 2016, The Sydney Morning Herald Online, <http://www.smh.com.au/queensland/revenge-porn-laws-needed-sooner-rather-than-later-20160204-gmm432.html>.

3.117 Internationally, a number of jurisdictions have criminalised revenge pornography, including the Philippines, Israel, Japan, Canada, New Zealand, the United Kingdom and 26 states in the United States.¹⁵⁷

Committee comment

3.118 Developments in Australia and internationally across both the civil and criminal law are indicative of increasing public recognition of ‘privacy’ as an important asset and the public interest in protecting it.

3.119 The committee notes that in some overseas jurisdictions, notably in the United Kingdom and New Zealand, the existence of human rights frameworks that recognise an individual’s right to privacy have contributed to the development of common law torts that operate to protect against invasions of privacy or to redress them when they occur. Unfortunately, however, Australia does not have a human rights bill or other comprehensive human rights protection legal system as exists in those jurisdictions.

3.120 The committee acknowledges the developments in other Australian jurisdictions of the criminal law targeting revenge pornography. As noted in our earlier comment at 3.51, it was not within our remit to consider the introduction of new criminal offences. However, if the Criminal Code Amendment (Private Sexual Material) Bill 2015 currently before the Australian Parliament is passed it will criminalise revenge across Australia, which is a positive move that would be welcomed by the committee.

3.121 Even if the federal bill is not enacted, however, the committee believes that the introduction of a statutory cause of action for serious invasions of privacy in New South Wales would provide an adequate remedy (and deterrent) for such behaviour. The committee makes a number of recommendations in this regard in the next chapter.

¹⁵⁷ Submission 13, Dr Nicola Henry, Dr Anastasia Powell and Dr Asher Flynn, p 3.

Chapter 4 A statutory cause of action for serious invasions of privacy

This chapter discusses the need for a statutory cause of action or statutory tort for serious invasions of privacy in New South Wales. It considers the models for such an action proposed by various law reform commissions, particularly the model proposed by the Australian Law Reform Commission (ALRC) in its 2014 *Serious Invasions of Privacy in the Digital Era* report. The chapter contains numerous recommendations for legislative action in this state.

The need for a statutory cause of action

- 4.1 The committee's terms of reference require it to consider whether or not statutory cause of action for serious invasions of privacy should be introduced in New South Wales.
- 4.2 Organisations representing media and arts community interests strongly opposed the need for such an action, arguing that existing remedies provide adequate protection or recourse to those suffering invasion of privacy. Ms Sarah Waladan, Manager of Media Policy and Regulatory Affairs of Free TV Australia, told the committee:

We are of the view that, in the context of the current framework, a statutory cause of action is unnecessary. There are already a plethora of State and Commonwealth laws that deal with privacy. They sufficiently cover the issues concerned.¹⁵⁸

- 4.3 The Arts Law Centre of Australia similarly argued that '[t]he existing remedies for serious invasions of privacy are sufficient'¹⁵⁹, referring to a number of laws relating to privacy as well as developments in case law.
- 4.4 The joint submission made by media organisations including AAP, APN, ASTRA, Bauer Media, Commercial Radio Australia, Fairfax Media, Free TV, MEAA, News Corp Australia, SBS, The Newspaper Works and West Australian News, detailed various legislative provisions relevant to privacy protection including Commonwealth and state-based privacy and personal information acts; surveillance, listening devices, and telecommunications interception acts; as well as legislation restricting reporting on particular types of matters.¹⁶⁰ The submission also identified common law actions that could offer a remedy to victims of serious invasions of privacy (discussed in chapter 3). In referring to the issues of revenge pornography, drones and neighbourhood surveillance identified in the media release announcing this inquiry, it commented:

The Media Organisations are of the view that these laws adequately address concerns regarding invasions of privacy. To the extent that specific issues have been cited in the Media Release accompanying the establishment of this inquiry, we would support an approach of investigating the specific issues, including whether or not the plethora of State and Commonwealth laws covering privacy and other issues (for example the

¹⁵⁸ Evidence, Ms Sarah Waladan, Manager, Media Policy and Regulatory Affairs, Free TV Australia, 16 November 2015, p 11.

¹⁵⁹ Submission 11, Arts Law Centre of Australia, p 3.

¹⁶⁰ Submission 22, Joint Media Organisations, pp 1-2.

Criminal Code Act 1995) already address these concerns, and engaging in further discussions about how a targeted and proportionate response might be best achieved.¹⁶¹

- 4.5** However, the vast majority of inquiry participants argued that existing statutory and common law actions fail to provide adequate remedies for serious invasions of privacy, and that a statutory cause of action or statutory tort is needed. For example, Ms Hanna Ryan commented:

The privacy of Australians and people in New South Wales is currently inadequately protected by a range of different laws and we submit that we need a statutory cause of action to protect the right to privacy.¹⁶²

- 4.6** Mr Bruce Baer Arnold, Director of the Australian Privacy Foundation reflected on the proposals for a statutory cause of action put forward by various law reform commissions (outlined in the following sections) to state:

The Foundation calls on the Committee to recommend law reform that specifically deals with serious invasions of privacy. That reform has been proposed in detail by the NSW Law Reform Commission. It has been proposed by the Australian Law Reform Commission. It has been proposed by law reform commissions and parliamentary committees in Victoria and other jurisdictions. Put simply: it is not new, it is not frightening; it is quite achievable.¹⁶³

- 4.7** Ms Maeve Curry, representing NSW Young Lawyers Communications, Entertainment and Technology Committee, also argued that existing remedies for privacy breaches (particularly the breach of confidence action) were inadequate and noted the strong support for a statutory cause of action by participants in this inquiry:

... our privacy legislation must be adaptable to emerging technology and unforeseen examples of privacy invasion. The equitable cause of action of breach of confidence does not cover the field of conduct. I understand that is the position of all but three of the submissions to this inquiry – that being that another statutory cause of action is necessary to do that because the equitable cause of action is inadequate to address the wide-ranging and far-reaching harms to victims of this type of harm, and the need to deter perpetrators from engaging in this type of behaviour.¹⁶⁴

- 4.8** Dr Normann Witzleb, Associate Professor, Faculty of Law, Monash University summarised five key points of consensus with respect to the contributions to this inquiry in his opening statement to the committee:

[There is a consensus that] better protection of privacy is needed and it is needed now; a statutory privacy tort is the missing capstone of privacy protection; the protection provided by the tort needs to be accessible to persons of limited financial means; and

¹⁶¹ Submission 22, Joint Media Organisations, pp 1-2.

¹⁶² Evidence, Ms Hanna Ryan, Vice President, New South Wales Council for Civil Liberties, 30 October 2015, p 13.

¹⁶³ Evidence, Mr Bruce Baer Arnold, Director, Australian Privacy Foundation, 30 October 2015, p 52.

¹⁶⁴ Evidence, Ms Maeve Curry, Committee Member, Communications, Entertainment and Technology Committee, NSW Young Lawyers, 30 October 2015, p 36.

the LRC [Australian Law Reform Commission] recommendations for the privacy tort are the most useful template for designing the cause of action.¹⁶⁵

- 4.9 Ms Sophie Farthing, Senior Policy Officer from the Public Interest Advocacy Centre, suggested that a statutory cause of action would have a number of benefits, including that it would enhance social norms around the issue of privacy more broadly:

I think it is quite clear that we would like a statutory cause of action ... We think it would provide certainty. We think it would provide remedies where currently there are no remedies. It would provide a change in the social norms around privacy ...¹⁶⁶

Committee comment

- 4.10 The committee acknowledges the opposition by the media and arts community representatives to the introduction of a statutory cause of action for serious invasions of privacy, which expressed the view that existing state and Commonwealth laws provide adequate remedies for such invasions.
- 4.11 This view, however, is in stark contrast to the view expressed by the vast majority of inquiry participants who acknowledged that while there are a range of laws that *may* be applicable to particular serious invasions of privacy, there remain significant gaps in the coverage afforded to privacy protection.
- 4.12 It is clear from the evidence received by this inquiry that the existing privacy framework in New South Wales does not provide adequate remedies to many people who suffer a serious invasion of privacy. The experience of Witness A, discussed in chapter 2, is a striking example of just how inadequate our current laws are.
- 4.13 The committee considers that the lack of a cause of action that is specifically designed to respond to the harm arising from a serious invasion of one's privacy has resulted in awkward attempts to manipulate privacy claims into other actions that are not intended for that purpose.
- 4.14 As such, the committee is persuaded that a statutory cause of action should be introduced to provide appropriate redress to people who suffer a serious invasion of privacy.

Recommendation 3

That the NSW Government introduce a statutory cause of action for serious invasions of privacy.

¹⁶⁵ Evidence, Dr Normann Witzleb, 16 November 2015, p 22.

¹⁶⁶ Evidence, Sophie Farthing, Senior Policy Officer, Public Interest Advocacy Centre, 16 November 2015, p 52.

Models for a statutory cause of action

- 4.15** As noted in chapter 1, the Australian, Victorian and NSW Law Reform Commissions have examined the law relating to privacy and have each supported the introduction of a statutory cause of action for invasions of privacy.
- 4.16** In its 2014 report,¹⁶⁷ the ALRC made 52 recommendations which set out a detailed legal design for a statutory civil cause of action for serious invasion of privacy. The ALRC model was the subject of considerable focus during this inquiry.
- 4.17** The following sections describe some key aspects of the ALRC model, and – where relevant – includes consideration of how it differs from the model proposed in 2009 by the NSWLRC which was set out in a draft bill appended to its report,¹⁶⁸ and the 2010 Victorian Law Reform Commission (VLRC) model.¹⁶⁹

Scope

- 4.18** The ALRC supports a statutory cause of action that is relatively narrow in scope in that it would only apply to two categories of invasion of privacy: intrusion upon seclusion; and misuse of private information.
- 4.19** The ALRC and VLRC both reported that ‘intrusion upon seclusion’ and ‘misuse of private information’ are the two most recognised categories of invasion of privacy.¹⁷⁰ The former generally refers to invasions or intrusions into a person’s private physical space. The ALRC stated that ‘[w]atching, listening to and recording another person’s private activities are the clearest and most common examples of intrusion upon seclusion.’¹⁷¹
- 4.20** The concept of intrusion upon seclusion has developed significantly in the United States where there is a specific privacy tort for intrusion:

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.¹⁷²

¹⁶⁷ Australian Law Reform Commission (2014), *Serious Invasions of Privacy in the Digital Era: Report 123* (hereafter referred to as ‘ALRC 2014 Report’).

¹⁶⁸ The Civil Liability Amendment (Privacy) Bill 2009 was appended to the NSW Law Reform Commission report (2009), *Invasion of Privacy*, Report 120 (hereafter referred to as ‘NSWLRC 2009 Report’). The bill proposed amendments to the *Civil Liability Act 2002* to give effect to the recommendations in the commission’s report.

¹⁶⁹ Victorian Law Reform Commission report (2010), *Surveillance in Public Places*, Report 18 (hereafter referred to as ‘VLRC 2010 Report’).

¹⁷⁰ ALRC 2014 Report, p 76; VLRC 2010 Report, p 149.

¹⁷¹ ALRC 2014 Report, p 76.

¹⁷² Submission 25, NSW Young Lawyers Communications, Entertainment and Technology Committee, p 10, quoting s 652B US *Restatement of the Law, Second, Torts* (1977).

4.21 ‘Misuse of private information’ generally refers to cases where there has been an unauthorised disclosure, but can also capture the wrongful obtaining of a person’s private information.¹⁷³ In the United Kingdom, following the 2004 case of *Campbell v MGN Ltd* (discussed in chapter 3 at 3.90), there is now a recognised basis for action where there is an unauthorised disclosure of private information (although it has developed in common law out of the equitable action of breach of confidence).

4.22 Lord Hoffman commented on the importance of one’s private information to their sense of autonomy, stating:

Instead of the cause of action being based upon the duty of good faith applicable to confidential personal information and trade secrets alike, it focuses upon the protection of human autonomy and dignity – the right to control the dissemination of information about one’s private life and the right to the esteem and respect of other people.¹⁷⁴

4.23 By comparison, the ALRC’s earlier 2008 report¹⁷⁵ and the NSWLRC’s 2009 report supported a broad cause of action that was not limited to invasions of privacy in the nature of intrusion upon seclusion or misuse of private information.

Nature of the cause of action

4.24 If a statutory cause of action for serious invasions of privacy were to be introduced, a key consideration is whether the cause of action ought to be described as an action in tort.

4.25 This issue was considered by the three law reform commissions, with the ALRC in its 2014 report being the only one to recommend a characterisation of the statutory cause of action as an action in tort.¹⁷⁶ It provided six reasons to support this, which were that a tort would:

- provide certainty about a range of ancillary issues
- allow the application of common law principles settled in analogous tort claims
- mirror the approach taken in comparable jurisdictions, thus enabling Australian courts to draw on analogous external case law
- clarify and highlight distinctions between the statutory cause of action for invasion of privacy and existing regulatory regimes
- differentiate it from equitable and contractual actions for breach of confidence
- not constrain the legislature, by mere fact of its characterisation as an action in tort, from providing for remedies not generally available in tort at common law.¹⁷⁷

¹⁷³ ALRC 2014 Report, p 81.

¹⁷⁴ *Campbell v MGN Ltd* [2004] 2 AC 457, [51].

¹⁷⁵ Australian Law Reform Commission (2008), *For Your Information: Privacy Law and Practice*, Report 108.

¹⁷⁶ ALRC 2014 Report, Recommendation 4-2.

¹⁷⁷ ALRC 2014 Report, pp 68-70.

4.26 In contrast, the VLRC, NSWLRC and the ALRC in its 2008 report all recommended a statutory cause of action, but not a statutory tort.¹⁷⁸ The NSWLRC, in recommending against identifying the cause of action as an action in tort, asserted two key bases for doing so. The first basis being that torts do not require the court to balance other interests in assessing whether there is an action; the second being that it did not consider it necessary for the cause of action to be restricted by rules applicable to tort law:

... tortious causes of action do not generally require the courts to engage in an overt balancing of relevant interests ... in order to determine whether or not the elements of the cause of action in question are satisfied ... [T]he statutory cause of action should not necessarily be constrained by rules or principles generally applicable in the law of torts.¹⁷⁹

4.27 While initially indicating support for a privacy action described as a cause of action in tort, Dr Witzleb submitted that it was not a critical matter because it is up to the courts to determine how to apply the law, based on established statutory interpretation principles:

In reality, the matter of whether the statutory cause of action is identified as a tort, or not, is not as significant as a reading of the reports of either Commission might suggest. The reason for this is as follows: A court is neither precluded from applying a rule that makes reference to a 'tort' when dealing with a statutory cause of action not expressly identified as a statutory tort. Nor will a court automatically and unquestioningly apply to a statutory privacy wrong a rule that makes reference to a 'tort' solely because the statutory action is described in the Act as a tort. In either case, the court will be guided in its application of the law by principles of statutory interpretation as well as the doctrine of precedent [citation omitted].¹⁸⁰

Fault element

4.28 In the various examinations by the law reform commissions on the question of the fault element, there was consensus that an invasion of privacy should attract liability if it is done intentionally or if it is reckless, however there was some divergence on the question of whether negligent acts should be included.

4.29 The ALRC discussed the threshold of intention or recklessness in its 2014 report, stating:

There is little argument against the proposition that [the tort] ... should be actionable where the defendant has intentionally invaded the privacy of the plaintiff. Deliberate and unjustifiable invasions of an individual's privacy are clearly culpable and beyond what any person should be expected to endure in the ordinary circumstances and exigencies of everyday life or from their interactions with others in society [citations omitted].¹⁸¹

¹⁷⁸ Submission 31, Dr Elizabeth Coombs, NSW Privacy Commissioner, p 27; Submission 29, Department of Justice, NSW Government, p 13.

¹⁷⁹ NSWLRC 2008 Report, p 50.

¹⁸⁰ Answers to questions on notice, Dr Normann Witzleb, 7 January 2016, p 12.

¹⁸¹ ALRC 2014 Report, p 112.

- 4.30** It went on to note that intentional or reckless conduct clearly falls within the protection intended by Article 17 of the International Convention on Civil and Political Rights,¹⁸² and that most jurisdictions with a tort for invasion of privacy require that the conduct be intentional or reckless.¹⁸³
- 4.31** The ALRC recommended that the action be confined to intentional or reckless invasions of privacy.¹⁸⁴ It did not support an extension of application of the tort to conduct that is negligent, commenting that it should not be actionable where there is merely an intention to do an act that has the inadvertent consequence of invading a person's privacy. The commission explained, 'it may be quite common to intend an action that will have the consequence of invading someone's privacy, without intending to invade their privacy'.¹⁸⁵
- 4.32** In a 2007 consultation paper issued as part of its review into invasion of privacy, the NSWLRC suggested that 'including liability for negligent or accidental acts in relation to all invasions of privacy would, arguably, go too far'.¹⁸⁶ However, in its 2009 report on the review, the commission did not restrict its proposed cause of action in this way, preferring to leave it open to unintentional invasions of privacy.¹⁸⁷ Nonetheless the NSWLRC did comment that, in its view, 'liability will generally arise ... only where the defendant has acted intentionally'¹⁸⁸ and that it considered the question of whether negligent conduct met the relevant threshold for liability to arise was 'a matter appropriately left to development in case law'.¹⁸⁹
- 4.33** Some participants to this inquiry considered there was merit in creating a statutory cause of action that captured negligent invasions.¹⁹⁰ The Australian Privacy Foundation, for example, submitted that 'there is no sound legal or policy basis for limiting the scope of the action to either intentional or reckless acts rather than incorporating negligent acts'.¹⁹¹
- 4.34** Similarly, Dr Witzleb supported a cause of action that captured negligent invasions, commenting:

... there are cases where privacy invasions have been committed negligently but they still have very serious consequences and people that would be the victim of those

¹⁸² ALRC 2014 Report, p 112.

¹⁸³ ALRC 2014 Report, p 112.

¹⁸⁴ ALRC 2014 Report, Recommendation 7-1.

¹⁸⁵ ALRC 2014 Report 123, p 115.

¹⁸⁶ New South Wales Law Reform Commission (2007) *Invasion of Privacy, Consultation Paper 1*, p 7.

¹⁸⁷ See Submission 29, Department of Justice, NSW Government, p 14. See also NSWLRC 2008 Report, p 50. Generally speaking, intentional torts are a *deliberate* interference with a legally recognised interest, and as a consequence damages available tend to be more generous than for negligent torts. Negligent torts occur when a defendant's actions were unreasonably unsafe.

¹⁸⁸ NSWLRC 2008 Report, p 50.

¹⁸⁹ NSWLRC 2008 Report, p 50.

¹⁹⁰ Answers to questions on notice, Ms Anna Salinger, Director, Salinger Privacy, 20 November 2015, p 1; Answers to questions on notice, Australian Privacy Foundation, 15 December 2015, p 1; Evidence, Dr Witzleb, 16 November 2015, p 23.

¹⁹¹ Answers to questions on notice, Australian Privacy Foundation, 15 December 2015, p 1.

privacy invasions would be without redress if the invasion depended on the defendant having acted with intentional recklessness.¹⁹²

- 4.35** The NSW Council for Civil Liberties, in support of an action that would capture negligent invasions, cited an example demonstrating the inadequacy of such an action if it did not capture negligent actions:

The Department of Immigration last year published details of 10,000 or so asylum seekers in circumstances where those personal details were available on the internet for anyone to view. There must have been a human error somewhere but that occurred as a failure of complex IT systems which resulted in that publication ... That is an example of where there can be very serious consequences for breach of privacy and unwarranted disclosure of personal information in circumstances where there may have been no negligence and no easy ability to find recklessness or other breaches.¹⁹³

- 4.36** Ms Hanna Ryan, Vice President of the NSW Council for Civil Liberties, pointed out the unlikelihood of big data breaches such as this meeting an intention or recklessness threshold:

[I]n those situations of mass data breach or where there is a big set of data that has been lost control of you are never going to be able to meet the standard of recklessness or intention. As big data develops that kind of risk grows ever more. I think it is worth responding to it.¹⁹⁴

- 4.37** Mr Stephen Blanks, President of the NSW Council for Civil Liberties, submitted that the action should focus on ‘the disclosure and the consequence rather than exactly how it occurred.’¹⁹⁵

- 4.38** However, a number of other inquiry participants considered it would be ‘unfair’¹⁹⁶ to attribute civil liability to individuals who negligently committed a serious invasion of privacy.¹⁹⁷

- 4.39** One idea canvassed during the inquiry was for different fault standards to apply to corporations and governments than to individuals. This was supported by NSW Young Lawyers, which noted that corporations and governments have a greater capacity to safeguard information and that the information they hold is likely to have the potential to cause greater damage, thus justifying a higher responsibility:

A major factor in considering such a wider fault element would be that corporations are more likely to have the resources to access more sophisticated equipment and technology to collect and maintain private material, and a breach could therefore have broader consequences, so implementing additional safeguards and/or processes to avoid a negligent invasion of privacy would be relatively less burdensome on the

¹⁹² Evidence, Dr Witzleb, 16 November 2015, p 23.

¹⁹³ Evidence, Mr Stephen Blanks, President, NSW Council for Civil Liberties, 30 October 2015, p 16.

¹⁹⁴ Evidence, Ms Ryan, 30 October 2015, p 16.

¹⁹⁵ Evidence, Mr Blanks, 30 October 2015, p 17.

¹⁹⁶ Answers to questions on notice, Drs Henry and Powell, 24 November 2015, p 2.

¹⁹⁷ Answers to questions on notice, Drs Henry and Powell, 24 November 2015, p 2; Answers to questions on notice, Mr Chris Chow, Chair NSW Young Lawyers’ Communication, Entertainment & Technology Law Committee; Ms Renée Bianchi, President, NSW Young Lawyers, 18 December 2015, p 1.

corporation (compared with an individual). With that increased capacity to implement safeguards and/or processes, should potentially come a higher level of responsibility. It is also arguable that the consequences of a negligent breach of privacy by a corporation could be more serious and/or widespread than that of an individual: compare, for example, a negligent breach by a news corporation, with circulation to millions, to that of an individual on Facebook with 300 friends.¹⁹⁸

4.40 Dr Witzleb also expressed support for the protection offered by such a distinction, stating that it:

... provides a deterrent against corporate carelessness, while dealing with the concern that imposing liability on individuals for simple lack of care may have undesirable consequences.¹⁹⁹

4.41 Dr Witzleb noted that while the ALRC restricted its fault element to intentional and reckless invasions, it also acknowledged the need to ensure a strong response by the law to negligent data breaches by corporations.²⁰⁰

4.42 Ms Hanna Ryan, Vice President of the NSW Council for Civil Liberties, made a similar point, noting the unlikelihood of big data breaches meeting an intention or recklessness threshold:

[I]n those situations of mass data breach or where there is a big set of data that has been lost control of you are never going to be able to meet the standard of recklessness or intention. As big data develops that kind of risk grows ever more. I think it is worth responding to it.²⁰¹

'Reasonable expectation of privacy'

4.43 All of the law reform commission proposals recommended an objective test conceptualised on a 'reasonable expectation of privacy'. The NSWLRC proposal provides that to establish the basis for a claim, two key elements should be present: 'first there must be facts in respect of which, in all the circumstance of the case, there is a reasonable expectation of privacy on the part of the plaintiff', and also that any claim for protection of privacy must not be of lesser value than any competing public interest in the same circumstances.²⁰² It proposed that both elements would be necessary to establish the basis for a claim in the first instance.

4.44 The ALRC recommended that a plaintiff be required to establish that a person in their position would have had a reasonable expectation of privacy in all the circumstances.²⁰³ It provided for a separate public interest test, which required a 'court to be satisfied that the public interest in privacy outweighs any countervailing interest.'²⁰⁴ However, it acknowledged that:

¹⁹⁸ Answers to questions on notice, Mr Chow and Ms Bianchi, 18 December 2015, p 1;

¹⁹⁹ Answers to questions on notice, Dr Witzleb, 11 January 2016, p 10.

²⁰⁰ Answers to questions on notice, Dr Witzleb, 11 January 2016, p 9.

²⁰¹ Evidence, Ms Ryan, 30 October 2015, p 16.

²⁰² NSWLRC 2008 Report, p 22.

²⁰³ ALRC 2014 Report, pp 92-94.

²⁰⁴ ALRC 2014 Report, Recommendation 9-1.

In some cases, a public interest matter will be so conspicuous that it may not be sensible to ignore it when determining whether the plaintiff has a reasonable expectation of privacy.²⁰⁵

Seriousness

- 4.45 There were differences in the approach of the law reform commissions in regard to the seriousness threshold. The NSWLRC did not restrict the proposed cause of action to ‘serious’ invasions of privacy:

Submissions made to us ... argued that a general cause of action for invasion of privacy is warranted because it specifically recognises the value of privacy as such, and fills gaps in the existing legal protection of privacy [citations omitted].²⁰⁶

- 4.46 The ALRC, although taking a different approach to the NSWLRC by supporting a threshold for seriousness, noted that in the four Canadian provinces that had legislated for a statutory cause of action, none contained such a threshold.²⁰⁷ It also commented that some of its stakeholders argued that a reasonable expectation of privacy was all that a person should need to establish to commence an action.²⁰⁸
- 4.47 Some of the ALRC’s review participants went so far as to suggest the additional ‘seriousness’ threshold was ‘unnecessary and arbitrary’.²⁰⁹ Others, however, supported an additional threshold. Some recommended the action should apply to ‘highly offensive’ invasions of privacy, while others suggested that the threshold should be high so that it would not ‘undermine freedom of expression and the media.’²¹⁰
- 4.48 The ALRC emphasised that the intention of its proposed tort was to provide a civil remedy to people who suffered a *serious* invasion of privacy. It ultimately concluded that an ‘additional and discrete threshold of seriousness would provide an additional means of discouraging people from bringing [trivial] actions,’²¹¹ and recommended that legislation provide specific guidance on the meaning of ‘serious’.²¹²

Proof of damage

- 4.49 None of the proposals required that a claimant prove damage before they could bring an action. The ALRC commented that, under its proposal, a plaintiff would already have to establish first that the invasion of privacy was serious; and second that the defendant invaded their privacy intentionally or recklessly. It considered that in those circumstances ‘a plaintiff

²⁰⁵ ALRC 2014 Report, p 96.

²⁰⁶ NSWLRC 2008 Report, pp 8-9.

²⁰⁷ ALRC 2014 Report, p 133.

²⁰⁸ ALRC 2014 Report, pp 132-133.

²⁰⁹ ALRC 2014 Report, p 133.

²¹⁰ ALRC 2014 Report, p 133.

²¹¹ ALRC 2014 Report, p 134.

²¹² ALRC 2014 Report, pp 134- 135.

should not also have to prove that they suffered actual damage. The tort should be actionable per se.²¹³

- 4.50** In making that recommendation, the ALRC commented that while many invasions of privacy may result in emotional distress, shame or humiliation, they often do not meet the threshold requirement for ‘actual damage’ that the law has traditionally provided a remedy to:

Making the tort actionable per se, like an action in trespass, will enable the plaintiff to be compensated for emotional distress caused by the defendant’s intentional or reckless conduct.²¹⁴

- 4.51** The NSWLRC proposal did not need to specify whether proof of damage was required, as it was designed as a statutory cause of action, and not as a tort. This is because ‘the requirement is inapposite to the statutory cause of action, which is designed primarily to protect the plaintiff from suffering non-economic loss, including mental distress.’²¹⁵ The NSWLRC explained:

If the action were tortious, it would be necessary to decide the issue since torts are either actionable on proof of damage (as in negligence) or without proof of such damage (“per se”) (as in trespass).²¹⁶

National uniformity

- 4.52** Both the ALRC and the NSWLRC acknowledged the importance of national uniformity in privacy laws, including those relating to a statutory cause of action.

- 4.53** The NSWLRC recommended the adoption of its draft bill nationally:

Recognising that the province of private law is foremost a matter of State law within Australia’s federal system, our preferred model for achieving uniformity is for State and Territory legislatures to enact the Bill attached to this report.²¹⁷

- 4.54** The NSWLRC noted that such an approach would require all jurisdictions to agree on its proposed provisions for a statutory cause of action, and incorporate ‘substantially uniform provisions’²¹⁸ within existing state or territory based legislation. It recommended the *Civil Liability Act 2002* (NSW) as an appropriate vehicle for this jurisdiction.

- 4.55** The ALRC, on the other hand, recommended that any statutory cause of action for serious invasion of privacy should be enacted by the Commonwealth²¹⁹ on the basis that ‘... this is the best way to ensure the action is available and consistent throughout Australia.’²²⁰

²¹³ ALRC 2014 Report, p 131.

²¹⁴ ALRC 2014 Report, p 131.

²¹⁵ NSWLRC 2008 Report, p 51.

²¹⁶ NSWLRC 2008 Report, p 51.

²¹⁷ NSWLRC 2008 Report, p 73.

²¹⁸ NSWLRC 2008 Report, p 73.

²¹⁹ ALRC 2014 Report, Recommendation 4-1.

²²⁰ ALRC 2014 Report, p 60.

Forums

4.56 The ALRC acknowledged the need to provide a range of forums for claimants wishing to pursue a civil remedy for a serious invasion of privacy. It recommended:

Federal, state and territory courts should have jurisdiction to hear an action for serious invasion of privacy under the Act. Consideration should also be given to giving jurisdiction to appropriate state and territory tribunals.²²¹

4.57 It commented that there had been a range of other inquiries that had acknowledged the appropriateness and potential for tribunals to hear actions for serious invasions of privacy, and further that there was ‘general agreement’ amongst stakeholders for ‘low cost forums.’²²²

4.58 Inquiry participants were supportive of any statutory cause of action for serious invasions of privacy being widely accessible. A number of participants espoused an appropriately resourced complaints model,²²³ while others supported a tribunal type model such as the NSW Civil and Administrative Tribunal (NCAT).²²⁴ The NSW Law Society expressed some support for courts to be the primary forum for privacy actions because of the certainty of outcomes and the lack of resourcing of non-judicial bodies.²²⁵

4.59 Other stakeholders supported a regime that offered a suite of avenues for people to access, on the basis that this offered flexibility for people to seek individualised justice. For example, the Privacy Commissioner suggested that any statutory cause of action should be:

... complemented by a complaints model, broadening the role of Privacy Commissioner to allow allegations to be investigated and appropriate determinations made. Determinations could be referred to a court or tribunal for review. The NSW Civil and Administrative Tribunal could play an important role in contested disputes.²²⁶

4.60 In indicating support for a complaints model, the Australian Information Commissioner, Mr Timothy Pilgrim PSM, highlighted the benefits of such a model:

[A complaints model] would be more accessible [than initiating court proceedings] to individuals and would encourage informal and low-cost resolution of disputes through conciliation. A court proceeding may be an option at a later stage in resolving a grievance.²²⁷

²²¹ ALRC 2014 Report, Recommendation 10-1.

²²² ALRC 2014 Report, p 167.

²²³ Evidence, Dr Elizabeth Coombs, NSW Privacy Commissioner, 30 October 2015, p 4; Submission 16, Office of the Australian Information Commissioner, pp 1-2; Evidence, Professor Barbara McDonald, Australian Law Reform Commission, 30 October 2015, p 22; pp 24-25.

²²⁴ See, for example, Evidence, Dr Coombs, 30 October 2015, p 6; Ms Elizabeth Tydd, NSW Information Commissioner, 30 October 2015, p 11; Evidence, Ms Anna Johnston, Director, Salinger Privacy, 16 November 2015, p 36. Evidence, Ms Farthing, 16 November 2015, p 50.

²²⁵ Answers to questions on notice, J F Eades, President, NSW Law Society, p 3.

²²⁶ Answers to questions on notice, Dr Elizabeth Coombs, NSW Privacy Commissioner, 25 November 2015, p 2.

²²⁷ Submission 16, Office of the Australian Information Commissioner, pp 1-2.

- 4.61** The NSW Council for Civil Liberties noted that the NCAT already has jurisdiction to determine private disputes, and that it is accustomed to dealing with complaints by private individuals in which a conciliation by a government agency has already been attempted.²²⁸
- 4.62** In response to questioning from the committee, Ms Farthing from the Public Interest Advocacy Centre agreed that there was merit in a framework that offered the following three pathways for redress:
- a complaints mechanism to an adequately resourced Privacy Commissioner with some determinative powers
 - the option of taking a claim to the NCAT for a low-cost adjudicative remedy
 - the option of bringing an action to a court of competent jurisdiction.²²⁹
- 4.63** Ms Farthing emphasised the importance of potential plaintiffs having choice when it came to deciding how to pursue redress:

We do not support having it made a compulsory process that you must go here first before you go there. With the nature of privacy invasion being individualised, the option should be available to complainants to take the course of action they want to pursue. That could be set up in any legislative framework you come up with.²³⁰

Defences and exemptions

- 4.64** The ALRC model included a number of defences to the proposed statutory cause of action, including a defence of fair report of proceedings of public concern,²³¹ and an exemption for children and young people.²³²
- 4.65** It also recommended that the cause of action require a plaintiff to establish that the public interest in privacy outweighs any countervailing public interest and that the legislation include a list of ‘countervailing public interest matters which a court may consider’ when considering whether that condition is met.²³³ The list includes the public interest in freedom of expression, including political communication and artistic expression and freedom of the media.
- 4.66** The Arts Law Centre welcomed the ALRC’s recommendation to invite courts to balance the public interest in artistic expression with any privacy interest, but asserted that any statutory cause of action should be stronger and ‘direct a court to consider the various public interest criteria, rather than invite it to do so.’²³⁴

²²⁸ Answers to questions on notice, NSW Council for Civil Liberties, 26 November 2015, p 7.

²²⁹ Evidence, Ms Farthing, 16 November 2015, p 50.

²³⁰ Evidence, Ms Farthing, 16 November 2015, p 50.

²³¹ ALRC 2014 Report, Recommendation 11-7.

²³² ALRC 2014 Report, Recommendation 11-8.

²³³ ALRC 2014 Report, Recommendations 9-1 and 9-2(a).

²³⁴ Answers to questions on notice, Arts Law Centre of Australia, 4 December 2015, pp 2-3.

Legislative action

4.67 It is clear that there has been considerable work done by a number of eminent inquiry bodies in recent years, with each supporting the enactment of a statutory cause of action for serious invasions of privacy. Despite this, no government has acted to introduce legislation in New South Wales or in other Australian jurisdictions to give effect to these recommendations.

4.68 The majority of inquiry participants were adamant that what is required now is legislative action. References were made to the comprehensive body of work already done by various law reform commissions and to reform that has occurred in other jurisdictions that offer privacy enhanced protection or remedy in the case of serious invasion. In this context, some stakeholders expressed frustration at the lack of action by consecutive governments at state and national levels:

We've been on this merry-go-round before. The ink is barely dry on the comprehensive, considered and balanced review conducted on this very topic by the Australian Law Reform Commission. The NSW Law Reform Commission also had a swing at this topic a few years back. Nothing has changed. No new laws, no new remedies ... my answer is yes. YES. Yes, we need better remedies for invasions of privacy. Because the law is failing us now.²³⁵

4.69 Inquiry participants largely supported implementation of the ALRC's 2014 model. While some suggested certain minor amendments to it such as, for example, expanding it to include negligent conduct²³⁶ or incorporating consideration of other public interests into a defence rather than incorporating it into the cause of action,²³⁷ in general they thought the model offered a good starting point.

4.70 For instance, Mr Edward Santow, Chief Executive Officer of the Public Interest Advocacy Centre, said that even without the minor refinements suggested by his organisation it would be preferable to adopt the model as is rather than continue to do nothing:

We are broadly in support of the enactment of a statutory cause of action along the lines of the ALRC. Based on our experience we are offering some refinements or improvements that would take a good model and make it better. But we have to remind ourselves: What are we comparing? We are comparing a current situation where there is no legislative protection with various models that would all be preferable to the current situation ... Doing nothing is significantly worse than the main orthodox legislative proposals before this Committee.²³⁸

²³⁵ Submission 8, Salinger Privacy, p 2.

²³⁶ Evidence, Ms Farthing, 16 November 2015, p 51; Evidence, Mr Kirk McKenzie, Chair, Human Rights Committee, Law Society of NSW, p 42; Evidence, Dr Witzleb, 16 November 2015, p 23.

²³⁷ Submission 10, Australian Lawyers Alliance, p 9; Evidence, Ms Farthing, 16 November 2015, p 51; Evidence, Ms Ryan, 30 October 2015, p 13.

²³⁸ Evidence, Mr Edward Santow, Chief Executive Officer, Public Interest Advocacy Centre, 16 November 2015, p 51. The 'refinements' supported by PIAC relate to an extension of the cause of action to cover negligent invasions, and providing for public interest matters to be considered as a defence, as opposed to it being incorporated into the cause of action.

- 4.71** The Australian Lawyers Alliance also indicated support for the ALRC's model 'in the main', and commented that it provides a 'clear and well-reasoned basis for enactment of a New South Wales Act providing for a tort of that nature.'²³⁹
- 4.72** The Arts Law Centre of Australia submitted that while it remains opposed to a statutory cause of action for invasions of privacy, the 'relatively narrow construction of [the ALRC model] could limit the potential scope for liability under such a cause of action, the damages sought, and unmeritorious claims being brought.'²⁴⁰
- 4.73** The NSW Council for Civil Liberties highlighted the public interest element in the ALRC model, which it pointed out would protect freedom of expression to the benefit of media and arts organisations:

As a civil liberties organisation our interest is not just in privacy. We are also strong defenders of the right to freedom of expression which can come into conflict with the right to privacy. We think that a public interest element to this cause of action will be sufficient to protect that interest. We note that although the media organisations have opposed a statutory cause of action in their submission, any action under the breach of confidence as it currently stands, or other forms of privacy protection, do not have a public interest defence.²⁴¹

- 4.74** In regard to uniformity across jurisdictions, Mr Kirk McKenzie, Chair of the Human Rights Committee at the NSW Law Society acknowledged that federal legislative reform was desirable, however, given the lack of political will nationally he recommended that New South Wales lead the way for other states to follow:

In view of the fact that the New South Wales Parliament has the power to introduce such legislation, it should not be afraid of doing it. It could well take a lead in this area. It was not so long ago that the New South Wales Parliament was the most important Parliament in this country. The Premiers of this State until World War II practically exercised more power than the Prime Minister. The Parliament still has that power—it has not been taken away. This is the sort of legislation where, if the New South Wales Parliament took heed of the Law Reform Commission's recommendations and implemented an appropriately judged Act, it could well provide a lead to the other States and Territories.²⁴²

- 4.75** A similar view was put by Dr David Vaile, Vice President of the Australian Privacy Foundation:

The New South Wales Parliament does have the power to effectively address serious invasions of privacy that occur within the State irrespective of whether those invasions occur in cyberspace using technology such as smartphones or involve traditional offences such as peeping Toms. We advocate practical and widely applicable remedies for serious invasions of privacy so that the people of New South Wales do not have to involve the police in most cases. You should not pass the buck

²³⁹ Submission 10, Australian Lawyers Alliance, pp 8- 9.

²⁴⁰ Answers to questions on notice, Arts Law Centre of Australia, 4 December 2015, p 2.

²⁴¹ Evidence, Ms Ryan, 30 October 2015, p 13.

²⁴² Evidence, Mr McKenzie, 30 October 2015, p 36.

to Malcolm Turnbull and expect the Commonwealth to solve the problems of New South Wales.²⁴³

4.76 As noted by the Privacy Commissioner, New South Wales has previously been a leader in privacy protection, when in 1975 ‘it acted as a catalyst for the introduction of [privacy] legislation throughout Australia.’²⁴⁴

4.77 In regard to implementing the ALRC model, the NSW Young Lawyers Communication, Entertainment and Technology Law Committee noted that its members comprise a cross-section of lawyers currently working or holding an interest in these fields of law to state:

[Even though our members] have differing views on alternatives to courts being the primary place where serious invasions of privacy rights are vindicated ... The one theme that appears consistent throughout the majority of the Committee’s members is that the introduction of laws protecting against serious invasions of privacy is overdue, and the Committee is of the view that the implementation of the Bill put forward by the ALRC should be a priority.²⁴⁵

Committee comment

4.78 The committee acknowledges the significant work done by the Australian and New South Wales law reform commissions in recent years, which has included comprehensive consultation with key stakeholders. We note that both bodies developed detailed models for a statutory cause of action to respond to serious invasions of privacy, but despite this, no government has legislated to enact privacy protection in line with those recommendations.

4.79 The committee considers that the lack of development of the common law (discussed in chapter 3) and the lack of political will federally to enact a statutory cause of action suggests that little will happen if New South Wales were to continue to wait for change at a federal level. The committee agrees with the majority of inquiry participants that, while a national approach to privacy protection would be desirable, the broader policy interest in providing an adequate response to serious invasions of privacy warrants New South Wales taking the lead on the issue and legislating for a statutory cause of action itself. Indeed the committee hopes that, with the enactment of a statutory cause of action, New South Wales would lead the way with other jurisdictions to follow suit.

4.80 The committee notes that most inquiry participants regarded the ALRC report to be both well-considered and balanced. We agree, and recommend that the model for the statutory cause of action at recommendation 3 be based on the ALRC model proposed in its 2014 report.

²⁴³ Evidence, Dr David Vaile, Vice President, Australian Privacy Foundation, 30 October 2015, p 52.

²⁴⁴ Evidence, Dr Coombs, 30 October 2015, p 3.

²⁴⁵ Answers to questions on notice, Mr Chow and Ms Bianchi, 18 December 2015, p 6.

Recommendation 4

That in establishing the statutory cause of action at recommendation 3, the NSW Government base the action on the Australian Law Reform Commission model, detailed in its 2014 report, *Serious Invasions of Privacy in the Digital Era*.

- 4.81** The committee notes that some stakeholders suggested that the model could be improved either through minor refinements to the fault element and/or to managing other public interests. However, with the exception of the fault element, the committee did not receive enough evidence regarding the individual elements of the ALRC's proposed model to make recommendations of this level of detail.
- 4.82** In regard to the fault element, on the other hand, the committee received significantly more evidence on this matter. We believe that a statutory cause of action with a wider fault element for governments and corporations (encompassing intent, recklessness *and* negligence) and a more limited fault element for individuals (encompassing only intent and recklessness) is an appealing option, and one that warrants consideration by the NSW Government.
-

Recommendation 5

That in establishing the statutory cause of action at recommendation 3, the NSW Government should consider incorporating a fault element of intent, recklessness and negligence for governments and corporations, and a fault element of intent and recklessness for natural persons.

- 4.83** In regard to access to the statutory cause of action, the committee acknowledges the comments of various inquiry participants that there is merit in providing a framework that caters for various avenues of redress including through a complaints mechanism, access to an appropriate tribunal, and making a claim through a court of relevant jurisdiction.
- 4.84** The committee agrees that it is important that individuals aggrieved through a serious invasion of privacy have access to a suite of avenues that offer a range of alternative outcomes to redress the harm caused. It considers that there is particular merit in having a complaints model that allows individuals to take a private complaint to an adequately resourced and empowered Privacy Commissioner.
- 4.85** The committee considers that it would be appropriate for the role of the NSW Privacy Commissioner to include scope to hear and determine complaints between individuals relating to alleged serious invasions of privacy. The committee is of the view that a complaints model such as this could be further strengthened if the Privacy Commissioner had determinative powers to make orders that involve non-financial forms of redress such as apologies, take-down orders and cease and desist orders. In support of this recommendation, we understand that the Federal Privacy Commissioner has determinative powers under s 52 of the *Privacy Act 1988* (Cth).
-

Recommendation 6

That the NSW Government:

- a) broaden the scope of the NSW Privacy Commissioner's jurisdiction to enable the Commissioner to hear complaints between individuals relating to alleged serious invasions of privacy;
 - b) empower the NSW Privacy Commissioner to make determinations that involve non-financial forms of redress, including apologies, take down orders and cease and desist orders
 - c) ensure that the NSW Privacy Commissioner is empowered to refer a complaint on behalf of a complainant to the NSW Civil and Administrative Tribunal for hearing for a statutory cause of action where there is a failure to act on a non-financial form of redress, including apologies, take down orders and cease and desist orders, and
 - d) ensure that the Office of the NSW Privacy Commissioner is adequately resourced to enable it to fulfil its functions arising from the expanded scope to deal with complaints arising from alleged serious invasions of privacy.
-

4.86 Finally, the committee notes the comments of the NSW Council for Civil Liberties that the NCAT already has jurisdiction to determine private disputes in other areas, and that it has experience in dealing with complaints by private individuals in circumstances where conciliation by a government agency has already been attempted but has failed.

4.87 The committee agrees that the NSW Civil and Administrative Tribunal offers an appropriate mid-range option that falls between a complaints mechanism and a court process for serious invasions of privacy, and recommends that it also be conferred with jurisdiction to hear such matters.

Recommendation 7

That the NSW Government confer jurisdiction on the NSW Civil and Administrative Tribunal to enable it to hear claims (in addition to ordinary civil courts) arising out of the statutory cause of action for serious invasions of privacy at recommendation 3.

Appendix 1 Submission list

No	Author
1	Ms Miriam Cullen
2	Mr George Nawar – Partially confidential
3	Mr Greg Piper MP
4	Australian Law Reform Commission
5	Mr Seppy Pour – Partially confidential
6	Name suppressed
7	Name suppressed
8	Salinger Privacy
9	Public Interest Advocacy Centre
10	Australian Lawyers Alliance
11	Arts Law Centre of Australia
12	Mr Rhys Michie
13	Dr Nicola Henry, Dr Anastasia Powell and Dr Asher Flynn
14	Confidential
14a	Confidential
15	The Law Society of New South Wales
16	Office of the Australian Information Commissioner
17	Mr Dominic WYkanak
18	Name suppressed
19	Name suppressed
20	Free TV Australia
21	Pacific Privacy Pty Ltd
22	Media Organisations - AAP, APN, ASTRA, Bauer Media, Commercial Radio Australia, Fairfax Media, Free TV, MEAA, News Corp Australia, SBS, The Newspaper Works and West Australian News
23	Ms Sandra Ernst
24	Australian Privacy Foundation
25	NSW Young Lawyers, Communications, Entertainment & Technology Committee
26	NSW Council for Civil Liberties
27	Information and Privacy Commission NSW
28	Civil Aviation Safety Authority
29	Department of Justice, NSW Government

No	Author
30	A/Prof Dr Normann Witzleb
31	Office of the Privacy Commissioner
32	Women's Legal Services NSW
33	Name suppressed

Appendix 2 Witnesses

Friday 30 October 2015 Macquarie Room, Parliament House, Sydney	Dr Elizabeth Coombs	NSW Privacy Commissioner, Office of the Privacy Commissioner
	Ms Elizabeth Tydd	CEO and NSW Information Commissioner, Information and Privacy Commission NSW
	Mr Stephen Blanks	President, NSW Council for Civil Liberties
	Ms Hanna Ryan	Member, Council for Civil Liberties Executive
	Mr Jared Boorer	Principal Legal Officer, Australian Law Reform Commission
	Professor Rosalind Croucher AM	President, Australian Law Reform Commission
	Professor Barbara McDonald	Former Commissioner of the Australian Law Reform Commission,
	Dr Nicola Henry	Senior Lecturer, Legal Studies, Department of Social Sciences and Commerce, La Trobe University, RMIT University, Monash University
	Dr Anastasia Powell	Senior Lecturer, Justice and Legal Studies, RMIT University
	Mr Kirk McKenzie	Chair, Law Society's Human Rights Committee, The Law Society of NSW
	Mr Chris Chow	Chair, Communications, Entertainment and Technology Committee, NSW Young Lawyers
	Ms Maeve Curry	Committee Member, Communications, Entertainment and Technology Committee, NSW Young Lawyers
	Ms Alexandra Davis	Solicitor, Women's Legal Services
	Ms Liz Snell	Law Reform and Policy Coordinator, Women's Legal Services NSW
	Mr Bruce Baer Arnold	Director, Australian Privacy Foundation
Asst Prof David Vaile	Vice-Chair, Australian Privacy Foundation	
In-camera Witness A		

Monday 16 November 2015 Parliament House, Sydney Parliament House	Ms Robyn Ayres	Executive Director, Arts Law Centre of Australia
	Ms Jennifer Arnup	Lawyer, Arts Law Centre of Australia
	Mr Chris Shain	Photographer, Arts Law Centre of Australia
	Ms Sarah Waladan	Manager of Media Policy & Regulatory Affairs, Free TV Australia
	Ms Sarah Kruger	Head of Legal and Regulatory Affairs, Commercial Radio Australia Limited; and member of Joint Media Organisations group
	A/Prof Dr Normann Witzleb	Associate Professor, Faculty of Law, Monash University
	Ms Anna Johnston	Director, Salinger Privacy
	Mr Edward Santow	Chief Executive Officer, Public Interest Advocacy Centre
	Ms Sophie Farthing	Senior Policy Officer, Public Interest Advocacy Centre
	In-camera Witness A	

Appendix 3 Tabled documents

30 October 2015

Public hearing, Macquarie Room, Parliament House

1. Document entitled 'Legislative Council Standing Committee on Law and Justice Inquiry into Remedies for the Serious Invasion of Privacy in New South Wales Opening Statement – NSW Privacy Commissioner 30 October 2015', *tendered by Dr Elizabeth Coombs, NSW Privacy Commissioner.*
2. Document entitled 'Digital Harassment and Abuse of Adult Australians: A Summary Report' by Dr Anastasia Powell and Dr Nicola Henry, *tendered by Dr Anastasia Powell, Senior Lecturer, Justice and Legal Studies, RMIT University.*
3. Submission of the Law Council of Australia to Mr Tim Watts MP regarding the *Criminal Code Amendment (Private Sexual Material) Bill*, *tendered by Mr Kirk McKenzie, Chair, Human Rights Committee, Law Society of New South Wales.*

Appendix 4 Answers to questions on notice

The committee received answers to questions on notice from:

- Free TV Australia
- Women's Legal Service NSW
- Dr Normann Witzleb, Monash University
- New South Wales Council of Civil Liberties
- Salinger Privacy
- Public Interest Advocacy Centre
- New South Wales Young Lawyers, Communications, Entertainment and Technology Committee
- Law Society of New South Wales
- NSW Information and Privacy Commission
- NSW Information Commissioner
- Dr Elizabeth Coombs, NSW Privacy Commissioner
- Dr Nicola Henry and Dr Anastasia Powell
- Arts Law Centre of Australia
- Professor Barbara McDonald on behalf of the Australian Law Reform Commission
- Australian Privacy Foundation

Appendix 5 Minutes

Minutes no. 2

Wednesday 1 July 2015

Standing Committee on Law and Justice

Room 1254, Parliament House, 3.05 pm

1. Members present

Ms Maclaren-Jones, *Chair*

Ms Voltz, *Deputy Chair*

Mrs Taylor (via teleconference from 3.10 pm)

Ms Faruqi (substituting for Mr Shoebridge)

2. Teleconference issues

Mr Clarke and Ms Taylor attempted to phone in via teleconference, however, were unable to connect due to technical issues. Mrs Taylor was subsequently able to connect through a different number.

3. Apologies

Mr Mookhey

4. Draft minutes

Resolved, on the motion of Ms Voltz: That draft minutes no. 1 be confirmed.

5. ***

6. Inquiry into remedies for the serious invasion of privacy in New South Wales

6.1 Terms of reference

The committee noted the following terms of reference referred by the House on 24 June 2015:

That the Standing Committee on Law and Justice inquire into and report on remedies for the serious invasion of privacy in New South Wales, and in particular:

- (a) the adequacy of existing remedies for serious invasions of privacy, including the equitable action of breach of confidence,
- (b) whether a statutory cause of action for serious invasions of privacy should be introduced, and
- (c) any other related matter.

6.2 Proposed timeline

Resolved, on the motion of Ms Voltz: That the committee adopt the following timeline for the administration of the inquiry:

Call for submissions	1 July 2015
Submissions due	4 September 2015
Hearings	October or November 2015
Table report	Mid-February 2016

6.3 Stakeholder list

Mrs Taylor joined the meeting.

Resolved, on the motion of Ms Voltz: That the secretariat email members with a list of stakeholders to be invited to make written submissions, and that members have two days from the email being circulated to nominate additional stakeholders.

6.4 Advertising

Resolved, on the motion of Ms Voltz: That the inquiry be advertised via twitter, stakeholder letters, a media release distributed to all media outlets in New South Wales, and advertisements placed in the Early General News section of the Sydney Morning Herald and Daily Telegraph.

7. Next meeting

The committee adjourned at 3.14 pm, *sine die*.

Teresa McMichael
Committee Clerk

Minutes no. 3

Wednesday 9 September 2015

Standing Committee on Law and Justice

Waratah Room, Parliament House, 1.06 pm

1. Members present

Mrs Maclaren-Jones, *Chair*

Ms Voltz, *Deputy Chair*

Mr Clarke

Mr Searle (participating)

Mr Shoebridge

Mrs Taylor

2. Draft minutes

Resolved, on the motion of Mr Clarke: That draft minutes no. 2 be confirmed.

3. Correspondence

The committee noted the following items of correspondence:

Received:

- ***
- 21 July 2015- Email from Professor Barbara McDonald to Director, offering to provide a briefing to the committee about the Australian Law Reform Commission's 2014 inquiry *Serious Invasions of Privacy in the Digital Era*
- 14 July 2015 – Email on behalf of Commissioner, Australian Federal Police, to Chair, advising that having reviewed the terms of reference they will not be making a submission
- 9 July 2015 – Email from Mr John McDonnell, A/Crown Solicitor, NSW Crown Solicitor's Office to Chair, advising that it will not be making a submission as the issues primarily concern matters of policy.

Sent:

- 22 July 2015 – Correspondence from Chair to Dr Elizabeth Coombs, Privacy Commissioner, requesting a briefing be provided to the committee on privacy laws in New South Wales.

4. ***

5. ***

6. **Inquiry into remedies for the serious invasion of privacy in New South Wales****6.1 Public submissions**

Resolved, on the motion of Mr Clarke: That the committee note that submissions nos. 1, 3-5 and 8-13 were published by the committee clerk under the authorisation of an earlier resolution.

6.2 Partially confidential submissions

Resolved, on the motion of Shoebridge: That submission nos. 2, 6 and 7 be partially confidential, as recommended by the secretariat, as they contain identifying information.

6.3 Closing date for submissions

The committee noted that the closing date for submissions has been extended until 20 September 2015.

6.4 Briefing from the Privacy Commissioner

Dr Elizabeth Coombs, the Privacy Commissioner, along with her colleague Ms Roxanne Marcelle-Shaw, were admitted to attend the meeting at 1.13 pm.

An informal briefing was provided to the committee by Dr Coombs and Ms Marcelle-Shaw.

7. **Next meeting**

The committee adjourned at 2.10 pm, *sine die*.

Teresa McMichael

Committee Clerk**Minutes no. 4**

Friday 30 October 2015

Standing Committee on Law and Justice

Macquarie Room, Parliament House, Sydney, 10.01 am

1. **Members present**Mrs Maclaren-Jones, *Chair*Ms Voltz, *Deputy Chair*

Mr Clarke

Mr Shoebridge (from 10.05 am)

Mrs Taylor

2. **Previous minutes**

Resolved, on the motion of Ms Voltz: That draft minutes no. 3 be confirmed.

3. **Correspondence**

The committee noted the following items of correspondence:

Received

- 29 September 2015 – Witness A to Director, requesting that she be able to appear as a witness at a hearing
- 22 September 2015 – Witness A to Director, requesting that her submission be made public
- ***

4. ***

5. **Inquiry into remedies for the serious invasion of privacy in New South Wales**

5.1 Public submissions

The committee noted that the following submissions were published by the committee clerk under the authorisation of an earlier resolution: submission nos 15-17 and 20-32.

5.2 Partially confidential submission

Resolved, on the motion of Mr Clarke: That the committee authorise the publication of submission no. 18, with the exception of identifying and/or sensitive information which are to remain confidential.

5.3 Confidential submission

Resolved, on the motion of Ms Voltz: That the committee keep submission no. 14 confidential, as per the recommendation of the secretariat, as it contains identifying and/or sensitive information.

Mr Shoebridge arrived.

5.4 Additional witness

Resolved, on the motion of Ms Voltz: That the committee invite Mr Seppy Pour to appear as a witness at the 16 November hearing.

5.5 Public hearing

Witnesses, the public and the media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witness was sworn and examined:

- Dr Elizabeth Coombs, NSW Privacy Commissioner.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:

- Ms Elizabeth Tydd, NSW Information Commissioner.

The evidence concluded and the witness withdrew.

The following witnesses were sworn and examined:

- Mr Stephen Blanks, Secretary, NSW Council for Civil Liberties

- Dr Lesley Lynch, Secretary, NSW Council for Civil Liberties
- Ms Hanna Ryan, Member, NSW Council for Civil Liberties Executive.

The evidence concluded and the witnesses withdrew.

The public and media withdrew.

5.6 Deliberative meeting

Resolved, on the motion of Mr Shoebridge: That the committee invite the author of submission 18 to appear in camera today at 1.50 pm.

5.7 Public hearing

Witnesses, the public and the media were re-admitted.

The following witnesses were sworn and examined:

- Professor Rosalind Croucher AM, President, Australian Law Reform Commission
- Mr Jared Boorer, Principal Legal Officer, Australian Law Reform Commission
- Professor Barbara McDonald, Professor, Faculty of Law, University of Sydney (former Commissioner of the Australian Law Reform Commission).

The evidence concluded and the witnesses withdrew.

The public and media withdrew.

5.8 In camera hearing

The following witness was sworn and examined: Witness A.

Persons present other than the committee:

- Ms Teresa McMichael, Clerk to the committee
- Ms Vanessa Viaggio, committee secretariat
- Ms Sarah Henderson, committee secretariat
- Hansard reporters.

The evidence concluded and the witness withdrew.

5.9 Public hearing

Witnesses, the public and media were re-admitted.

The following witnesses were sworn and examined:

- Dr Nicola Henry, Senior Lecturer, Legal Studies, La Trobe University
- Dr Anastasia Powell, Senior Lecturer, Justice and Legal Studies, RMIT University.

Ms Powell tendered the following document: 'Digital Harassment and Abuse of Adult Australians: A Summary Report', by Dr Anastasia Powell and Dr Nicola Henry.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Mr Kirk McKenzie, Chair, Human Rights Committee, Law Society of NSW
- Mr Chris Chow, Chair, Communication, Entertainment and Technology Committee, NSW Young Lawyers
- Ms Maeve Curry, Committee Member, Communications, Entertainment and Technology Committee, NSW Young Lawyers.

Mr McKenzie tendered the following document: submission of the Law Council of Australia to Mr Tim Watts MP regarding the Criminal Code Amendment (Private Sexual Material) Bill.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Ms Liz Snell, Law Reform and Policy Coordinator, Women's Legal Services
- Ms Alex Davis, Solicitor, Women's Legal Services.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Asst Prof Bruce Baer Arnold, Director, Australian Privacy Foundation
- Mr David Vaile, Vice-Chair, Australian Privacy Foundation.

The evidence concluded and the witnesses withdrew.

5.10 Tendered documents

Resolved, on the motion of Mr Shoebridge: That the committee accept the following documents tendered during the public hearing:

- 'Digital Harassment and Abuse of Adult Australians: A Summary Report', by Dr Anastasia Powell and Dr Nicola Henry.
- submission of the Law Council of Australia to Mr Tim Watts MP regarding the Criminal Code Amendment (Private Sexual Material) Bill.

6. Other business

In camera witness

Resolved, on the motion of Mr Shoebridge:

- that the committee refer Witness A's evidence to the NSW Privacy Commissioner for comment
- that the secretariat liaise with Witness A in regards to the publication of the witness' submission and *in camera* transcript
- that the secretariat liaise with Witness A as to whether the witness wishes to appear again before the committee.

Witnesses for second public hearing on 16 November 2015

Resolved, on the motion of Mr Shoebridge: That the NSW Police Force be invited to appear as a witness on 16 November 2015.

Resolved, on the motion of Mrs Taylor: That the secretariat liaise with the Parliamentary Education Office to explore the possibility of securing some student leaders to appear at a roundtable before the committee; and that, in the event PEO cannot assist, the secretariat liaise with first year communications students at the University of Technology Sydney, and the University of Western Sydney / King & Wood Mallesons partnership in respect of same.

7. Adjournment

The committee adjourned at 5.13 pm until Monday 16 November 2015 (privacy hearing).

Vanessa Viaggio

Clerk to the Committee

Minutes no. 5

Monday 16 October 2015

Standing Committee on Law and Justice

Macquarie Room, Parliament House, Sydney, 9.15 am

1. Members present

Mrs Maclaren-Jones, *Chair*

Ms Voltz, *Deputy Chair*

Mr Clarke (from 9.18am)

Mr Mookhey (from 9.18am)

Mr Shoebridge (from 9.19am)

Mrs Taylor

2. Previous minutes

Resolved, on the motion of Ms Voltz: That draft minutes no. 4 be confirmed.

3. Correspondence

The committee noted the following items of correspondence:

Received

- ***
- ***
- 10 November 2015 – Ms Jody Doualetas, A/Executive Officer, Office of the Commissioner, NSW Police Force to secretariat, declining the committee's invitation that a representative of the NSW Police Force appear as a witness at the hearing.

Sent

- 4 November 2015 – Chair to Police Commissioner Scipione, requesting he appear as a witness
- 4 November 2015 – secretariat to Dr Elizabeth Coombs, NSW Privacy Commissioner, seeking comment on certain evidence received by the committee at the 30 October 2015 hearing.

4. ***

5. **Inquiry into remedies for the serious invasion of privacy in New South Wales**

5.1 Confidential submission

Resolved, on the motion of Mrs Taylor: That the committee keep supplementary submission no. 14a and its attachments confidential, as per the recommendation of the secretariat as they contain sensitive information.

Mr Clarke, Mr Mookhey and Mr Shoebridge arrived.

5.2 In camera witness

Resolved, on the motion of Ms Voltz: That the evidence of Witness A on 16 November 2015 be heard *in camera*.

5.3 Publication of in camera evidence from 30 October 2015

Resolved, on the motion of Ms Voltz: That the committee authorise the publication of the *in camera* evidence of Witness A from 30 October 2015, with the exception of identifying and/or sensitive information which is to remain confidential, as per the request of the witness.

5.4 Reporting date

Resolved, on the motion of Ms Voltz: That the committee hold the privacy report deliberative on Friday 26 February 2016, and table the report on Thursday 3 March 2016.

5.5 Partially confidential submission

The committee noted receipt of submission no. 33, which was received after the submission closing date. The committee deferred consideration of its publication until the next meeting.

5.6 Public hearing

Witnesses, the public and the media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witnesses were sworn and examined:

- Ms Robyn Ayres, Executive Director, Arts Law Centre of Australia
- Ms Jennifer Arnup, Lawyer, Arts Law Centre of Australia
- Mr Chris Shain, Photographer.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Ms Sarah Waladan, Manager, Media, Policy and Regulatory Affairs, Free TV Australia; and member of Joint Media Organisations group
- Ms Sarah Kruger, Head of Legal and Regulatory Affairs, Commercial Radio Australia Limited; and member of Joint Media Organisations group.

The evidence concluded and the witnesses withdrew.

The following witness was sworn and examined:

- Dr Normann Witzleb, Associate Professor, Faculty of Law, Monash University.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:

- Ms Anna Johnston, Director, Salinger Privacy.

The evidence concluded and the witness withdrew.

The following witnesses were sworn and examined:

- Mr Ed Santow, Chief Executive Officer, Public Interest Advocacy Centre
- Ms Sophie Farthing, Senior Policy Officer, Public Interest Advocacy Centre.

The evidence concluded and the witnesses withdrew.

The public and media withdrew.

5.7 In camera hearing

Resolved, on the motion of Mr Shoebridge: That Dr Elizabeth Coombs, NSW Privacy Commissioner, be authorised to attend the in camera hearing of Witness A.

The following witness was sworn and examined: Witness A.

Persons present other than the committee:

- Ms Teresa McMichael, Clerk to the committee
- Ms Vanessa Viaggio, committee secretariat
- Ms Sarah Henderson, committee secretariat
- Hansard reporters.

The evidence concluded and the witness withdrew.

6. ****

7. ****

8. Adjournment

The committee adjourned at 3.11 pm until Monday 23 November 2015 (inmates hearing).

Vanessa Viaggio

Clerk to the Committee

Draft minutes no. 9

Friday 26 February 2016

Standing Committee on Law and Justice

Room 1136, Parliament House, 9:07 am

1. Members presentMrs Maclaren-Jones, *Chair*Ms Voltz, *Deputy Chair*

Mr Clarke

Mr Mookhey

Mr Shoebridge

Mrs Taylor

2. Draft minutes

Resolved, on the motion of Mrs Taylor: That draft minutes nos. 6 and 7 be confirmed.

3. Correspondence

The committee noted the following items of correspondence:

Received

- ****
- 1 December 2015 - Dr Wendy Heywood, Research Officer, Australian Research Centre in Sex, Health and Society, La Trobe University, to committee attaching copy of research report entitled 'Demographic and behavioural correlates of six sexting behaviours among Australian secondary school students'
- ****
- ****
- ****
- ****
- ****
- 12 February 2016 – Dr Elizabeth Coombs, NSW Privacy Commissioner, to committee, drawing the committee's attention to a recent Canadian civil case where the court awarded maximum damages to a plaintiff who suffered a serious invasion of privacy in a 'revenge pornography' type scenario
- ****
- ****

Sent:

- ****
- 30 November 2015 - Chair to Dr Wendy Heywood, La Trobe University, requesting a copy of her recently published study on sexting for the privacy inquiry
- ****
- ****

4. ******4.2 ********4.3 ******

5. Remedies for the serious invasion of privacy in New South Wales

5.1 Answers to questions on notice and supplementary questions

The committee noted that answers to questions on notice and supplementary questions from the following inquiry participants were published by the committee clerk under the authorisation of the resolution appointing the committee:

- Ms Vicky Kuek, Principal Policy Lawyer, The Law Society of New South Wales, received 19 November 2015
- Ms Anna Johnston, Director, Salinger Privacy, received 21 November 2015
- Dr Henry and Dr Powell, Senior Lecturers, RMIT University & La Trobe University, received 24 November 2015
- Ms Janet Loughman, Principal Solicitor, Women’s Legal Services NSW, received 25 November 2015
- Ms Elizabeth Tydd, Chief Executive Officer, Information and Privacy Commission NSW, received 25 November 2015
- Dr Elizabeth Coombs, NSW Privacy Commissioner, Office of the Privacy Commissioner, received 25 November 2015
- Mr Stephen Blanks, President, NSW Council for Civil Liberties, received 26 November 2015
- Mr Ed Santow, Chief Executive Officer, Public Interest Advocacy Centre, received 1 December 2015
- Ms Robyn Ayres, Executive Director, Arts Law Centre of Australia, received 4 December 2015
- Professor Barbara McDonald, Professor, Faculty of Law, University of Sydney, Former Commissioner of the Australian Law Reform Commission, received 8 December 2015
- Mr Bruce Baer Arnold, Director, Australian Privacy Foundation, received 15 December 2015
- Ms Sarah Waladan, Manager, Media Policy and Regulatory Affairs, Free TV Australia, received 18 December 2015
- Mr Chris Chow, Chair of the Communications, Entertainment and Technology, Law Committee of NSW Young Lawyers, received 18 December 2015
- Dr Normann Witzleb, Monash University, received 11 January 2016.

5.2 Transcript clarification

Resolved, on the motion of Mrs Taylor: That a footnote be inserted after the words “criminal record” on page 42 of the transcript of 16 November 2015, with the following words:

Clarification: Ms Johnston has advised that this example was given in error. She has subsequently referred to a study by a Harvard academic into discriminatory racial profiling affecting Google ad results. Refer to correspondence dated 20 November 2015 from Ms Johnston to the Chair.

5.3 Consideration of Chair’s draft report

The Chair submitted her draft report entitled *Remedies for the serious invasion of privacy in New South Wales* which, having been previously circulated, was taken as being read.

Chapter 1

Resolved, on the motion of Mr Clarke: That paragraph 1.7 be omitted: ‘It is also worth noting that the Australian Senate is currently undertaking an inquiry into the issue of revenge

pornography. The Senate committee, which is looking at many of the same issues examined in this inquiry, is due to report on 25 February 2016³, and the following new paragraph be inserted instead:

‘The Senate Legal and Constitutional Affairs References Committee has recently completed an inquiry specifically examining the issue of revenge pornography. The Senate committee recommended that the Commonwealth along with the states and territories enact criminal offences for the recording, sharing of intimate images without consent, and for threatening to do so. It also recommended that the Commonwealth government give further consideration to the Australian Law Reform Commission’s recommendations regarding a statutory cause of action.’ [FOOTNOTE: Recommendations 2, 3 and 6, Senate Legal and Constitutional Affairs References Committee, Parliament of Australia (2016) *Phenomenon colloquially referred to as ‘revenge porn’*.]

Chapter 2

Resolved, on the motion of Ms Voltz: That paragraph 2.14 be amended by omitting ‘however there was no suggestion that it was done with retaliation or revenge in mind as the two were romantically involved at the time’ after ‘Ms Bingle’s consent or knowledge’.

Resolved, on the motion of Mr Shoebridge: That the following new paragraph be inserted after paragraph 2.44:

‘The committee accepts that the ALRC’s nine guiding principles to shape the process of privacy law reform are balanced, clear and provide a basis on which governments should proceed to reform the law in this area.’

Resolved, on the motion of Mr Shoebridge: That paragraph 2.46 be amended by inserting at the end: ‘We would be ignoring the reality of the matter if we did not accept the view that this is an area of intrusion into privacy that is likely to become more topical and widespread in coming years. This adds weight to the case for adopting a more comprehensive and well-founded remedy for serious breaches of privacy to allow for any such disputes to be resolved in a timely, cost-effective and constructive manner.’

Chapter 3

Mr Shoebridge moved: That the following committee comment and recommendation be inserted at the end of paragraph 3.24:

‘Committee comment

Given the very real concerns the committee believes that there is a good case for a prompt statutory review of the scope of the exemption in s 27 of the Act to determine if it achieves the appropriate balance between ensuring police can effectively undertake their duties of law enforcement and crime prevention, while ensuring that there are measures in place to properly and adequately protect the privacy of NSW residents.

Recommendation

That the NSW Government undertake a review of the scope of the exemption in s 27 of the PPIP Act to determine if it achieves the appropriate balance between ensuring police can effectively undertake their duties of law enforcement and crime prevention, while ensuring that there are measures in place to properly and adequately protect the privacy of NSW residents.’

Question put and negatived.

Resolved, on the motion of Mr Shoebridge: That the following new paragraph be inserted after paragraph 3.43:

‘Women’s Legal Services made a number of recommendations regarding a statutory review of the Crimes (Domestic and Personal Violence) Act 2007 and apprehended violence orders. The organisation suggested:

8.4 Updated consultation on the statutory review of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW), including an exposure draft bill that contemplates the realities of technology-facilitated stalking and abuse.

8.5 Including an apprehended violence order (AVO) prohibiting the defendant from attempting to locate, asking someone else to locate, follow or keep the protected person under surveillance.

8.6 Including an AVO prohibiting the actual or threatened publishing or sharing of images or videos of the protected person of an intimate nature.

8.7 Including a provision allowing AVOs to be used for an injunctive order such as a take down order or deliver up order.’

Resolved, on the motion of Mr Shoebridge: That the following committee comment and recommendation be inserted after Recommendation 1:

‘Committee comment

The committee believes there is merit in the Women’s’ Legal Services NSW submission that the Government undertake a statutory review of the *Crimes (Domestic and Personal Violence) Act 2007*. This review should consider the benefits of including in the potential orders available to a local court in proceedings under the Act including take down orders and prohibitions on threatening or publishing or sharing of images or videos of an intimate nature.

Recommendation

That the NSW Government undertake a statutory review of the *Crimes (Domestic and Personal Violence) Act 2007* to consider additional potential remedies available to the Local Court to protect the privacy of individuals who have been or are seeking to be safeguarded by apprehended domestic violence orders.’

Resolved, on the motion of Mr Clarke: That the following new paragraph be inserted after paragraph 3.53:

‘The committee notes that the Senate Legal and Constitutional Affairs Reference Committee recently made recommendations for the introduction of criminal offences at a federal level as well as in the states and territories, specifically to address non-consensual sharing of intimate images.’

Resolved, on the motion of Ms Voltz: That the following new paragraphs be inserted at the end of the above new paragraph:

‘Recommendations 2 and 3 of the Senate committee’s report state:

Recommendation 2

5.18 Taking into account the definitional issues discussed in this report, the committee recommends that the Commonwealth government legislate, to the extent of its constitutional power and in conjunction with state and territory legislation, offences for:

- knowingly or recklessly recording an intimate image without consent;
- knowingly or recklessly sharing intimate images without consent; and
- threatening to take and/or share intimate images without consent, irrespective of whether or not those images exist.

Recommendation 3

The committee recommends that the states and territories enact legislation with offences the same or substantially similar to those outlined in Recommendation 2, taking into account relevant offences enacted by the Commonwealth government.

We note the above report. It would be appropriate for the NSW Government to consider the Senate Committee's recommendations.' [FOOTNOTE: Recommendations 2 and 3, Senate Legal and Constitutional Affairs References Committee, Parliament of Australia (2016) *Phenomenon colloquially referred to as 'revenge porn'.*]

Chapter 4

Resolved, on the motion of Ms Voltz: That recommendation 5 be amended by inserting the following new paragraph after paragraph b):

'c) ensure that the NSW Privacy Commissioner is empowered to refer a complaint on behalf of a complainant to the NSW Civil and Administrative Tribunal for hearing for a statutory cause of action where there is a failure to act on a non-financial form of redress, including apologies, take down orders and cease and desist orders, and'

Resolved, on the motion of Mr Mookhey: That recommendation 6 be amended by omitting 'to enable it to hear claims arising out of the statutory cause of action' and inserting instead 'to enable it to hear claims (in addition to ordinary civil courts) arising out of the statutory cause of action'.

Resolved, on the motion of Ms Voltz:

The draft report, as amended, be the report of the committee and that the committee present the report to the House;

The transcripts of evidence, submissions, tabled documents, answers to questions on notice and supplementary questions, and correspondence relating to the inquiry be tabled in the House with the report;

Upon tabling, all unpublished attachments to submissions be kept confidential by the committee;

Upon tabling, all unpublished transcripts of evidence, submissions, tabled documents, answers to questions on notice and supplementary questions, and correspondence relating to the inquiry, be published by the committee, except for those documents kept confidential by resolution of the committee;

The committee secretariat correct any typographical, grammatical and formatting errors prior to tabling;

The committee secretariat be authorised to update any committee comments where necessary to reflect changes to recommendations or new recommendations resolved by the committee;

Dissenting statements be provided to the secretariat within 24 hours after receipt of the draft minutes of the meeting;

That the report be tabled on Thursday 3 March 2016.

6. ****

7. **Adjournment**

The committee adjourned at 9:50 am *sine die*.

Vanessa Viaggio
Committee Clerk