

**Submission to the Australian Law Reform Commission's Discussion Paper:  
*Serious Invasions of Privacy in the Digital Era***

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Dear Professor McDonald,

We welcome the opportunity to respond to the Australian Law Reform Commission's (ALRC) consultation regarding serious invasions of privacy in the digital era. We are criminologists and socio-legal scholars working on an Australian Research Council (ARC) Discovery project on technology-facilitated sexual violence and harassment (TFSV). The aim of the project is to significantly strengthen understandings of adult women's experiences of technology mediated sexual violence and harassment, and to investigate the effectiveness of legal and policy frameworks for responding to these new and emerging harms.

Our research highlights a range of problematic behaviours which disproportionately affect women and girls. These behaviours include: (1) the unauthorised creation and distribution (actual or threatened) of sexual images; (2) the creation and distribution (actual or threatened) of sexual assault images; (3) using a carriage service to procure a sexual assault; (4) online sexual harassment and cyberstalking; and (5) gender-based hate speech. To date, our research has identified instances whereby a privacy-type violation, such as the non-consensual sexual image sharing or the posting of identifying information alongside gender-based hate speech (such as general threats of sexual violence against women), have caused significant harms to individual women; in many cases, causing ongoing distress.

Presently, civil and criminal laws are limited for responding to these harms. The limited scope of the current legislative frameworks, the lack of case law, the uncertainty around whether Commonwealth or state/territory law should apply, as well as the lack of specific legislation to tackle technology-facilitated sexual violence and harassment, means that Australian law at present "does not sufficiently accommodate the intent, magnitude, and range of harms" that are committed through offensive behaviours involving technology.<sup>1</sup>

This submission concerns how we believe the civil law can prevent and redress serious invasions of privacy, with a focus on the non-consensual creation and/or distribution of sexual images in the context of harassment, stalking and family or intimate partner violence.

1. We strongly support the establishment of a statutory cause of action (tort) for serious invasions of privacy in a new Commonwealth Act.
2. Currently the *Privacy Act 1988* (Cth) excludes individuals acting in their own capacity and a widening of its scope would help to ensure that the right to privacy is adequately protected in

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<sup>1</sup> Victorian Parliamentary Law Reform Committee (VPLRC) (2013) *Inquiry into Sexting: Report of the Law Reform Committee Inquiry into Sexting*. Parliamentary Paper No.230, Session 2010-2013. Melbourne: State Government of Victoria, p140. See also Nicola Henry & Anastasia Powell (2014) 'Beyond the "Sext": Technology-Facilitated Sexual Violence and Harassment against Adult Women', *Australian and New Zealand Journal of Criminology* (online first: <http://anj.sagepub.com/content/early/2014/04/30/0004865814524218.abstract>).

Australia. As stated in the ALRC Discussion Paper (2014: 22), “Modern privacy concerns are not... limited to the use of personal information by organisations. Many disputes about invasions of privacy are between individuals. Many of the cases in other jurisdictions involve the conduct of individuals”. Such behaviours include the installation of surveillance cameras to record the activities of neighbours, friends, partners, or strangers; and the “harmful, invasive and distressing disclosure of personal information and images by an individual’s former partner” (ibid).

3. The right to privacy is protected under the International Covenant on Civil and Political Rights (ICCPR) under Article 17, in which Australia is a signatory to. It provides: “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation”; and “Everyone has the right to the protection of the law against such interference or attacks”. However, the current *Privacy Act* is concerned only with “information privacy” and therefore does not adequately implement Australia’s obligations under the ICCPR.
4. The right to privacy is also protected under the *ACT Human Rights Act 2004* and the Victorian *Charter of Human Rights and Responsibilities Act 2006*, however, none of these existing laws create any new cause of action for an individual whose privacy has been seriously invaded. Although the right to privacy is not absolute and must be balanced with other rights, such as freedom of expression, freedom of speech and national security, establishing a statutory tort for serious invasion of privacy will ensure that individuals can live “dignified, fulfilling, safe and autonomous” lives, including the ability to form and sustain relationships with others; exercise freedom of speech, thought, expression, movement and association; and be free from undue interference or harm from others (ALRC 2013: 28). The behaviours we focus on here do not constitute acts in the public interest, and creating a statutory cause of action for serious invasion of privacy would not, in our view, constitute a threat to other valued rights and freedoms.
5. As explicitly noted in the Australian Law Reform Commission’s (2008) publication *For Your Information*, examples intended to fall within the ALRC’s recommended statutory cause of action for serious invasion of privacy include situations where the defendant sends or threatens to send sexually explicit images (text, photos, film) to the plaintiff’s friends, family members or colleagues, often in the aftermath of a relationship breakdown. Currently action for breach of confidence and intentional infliction of emotional harm have limited applicability in such situations. For example, there is uncertainty around whether breach of confidence requires circumstances importing a breach of confidence and whether intentional infliction of emotional harm requires proof of psychiatric harm. A test of seriousness for the proposed new privacy legislation should depend on the circumstances where the plaintiff has a reasonable expectation of privacy and such a test should not be predicated on proof of a psychiatric/psychological harm or injury. This will enable potential litigants to take action if they do not have to prove damage. However, it is important that consent to the original creation of a sexually explicit image does not serve to waive the plaintiff’s reasonable right to privacy when the defendant goes on to distribute the images without consent.
6. If damage becomes a prerequisite for action, we support a definition of damage beyond that of identifiable psychiatric harm so that it also includes humiliation, embarrassment and emotional stress.

7. We support a non-exhaustive list of examples being included in the legislation, and recommend that such a list explicitly include the behaviours amounting to technology-facilitated sexual violence and harassment as identified in this submission in a single cause of action.
8. We are concerned about consent being included as a defence in the proposed legislation because of the potential exclusion of individuals who have originally and freely consented to the creation of a sexually explicit image; and/or who have consented, under coercive circumstances, to the creation of a sexually explicit image. As such, if consent is to be included as a defence, it must be defined as free consent, including a list of circumstances in which an individual cannot be considered to have consented.
9. We support a wide range of remedies, including an apology and a take-down notice regime so that offending material can be removed. A take-down order must be binding on third parties, for example, internet content hosts/web managers.
10. We support a private cause of civil action alongside the criminal law (e.g. stalking and other legislation). However, we also note that law is not the only avenue for responding to these behaviours. Service providers of online communities and social media networks can and should be proactive in addressing these issues by providing mechanisms for users to report hateful and/or harassing content and can dedicate sufficient resources towards monitoring and removing such content. Clear community guidelines, terms of use on internet sites, and agreement between police and service providers may also be effective. Educational initiatives are crucial in fostering an ethical digital citizenship and can do much to educate people about the right to privacy. Finally, women's service providers can provide safety advice for women who are at risk of violence and harassment via new technologies. Victims can be encouraged to preserve evidence of abusive communications for future legal proceedings. There are dangers inherent in placing the burden on victims to prevent these various forms of technology-facilitated sexual violence and harassment. As such, civil and criminal laws no doubt play a vital role in preventing and addressing technology-facilitated sexual violence and harassment.
11. Finally, given the costs associated with civil litigation and the substantial cuts to legal aid schemes in recent years, particularly for civil litigants, many victims of technology-facilitated sexual violence and harassment will not have the financial means for bringing civil action for serious invasion of privacy. As such, we support the Australian Law Reform Commission's proposal for an independent regulator who may be able to bring proceedings on behalf of another person. We support the establishment of a tribunal to process complaints of serious invasion of privacy in order to remove some of the barriers to accessing justice for many disadvantaged members of the community who do not have the resources or means to commence litigation in the civil courts. We also note that Alternative Dispute Resolution (ADR) may not be appropriate in situations where a person has created and/or distributed sexually explicit images of another person without their consent. As such, we do not recommend ADR as a compulsory course of action for complainants, particularly in situations of intimate partner violence.

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Thank you for considering our submission.

Yours sincerely

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