WOMEN'S LEGAL SERVICES NSW

Incorporating
Domestic Violence Legal Service
Indigenous Women's Legal Program

13 May 2014

Commissioner McDonald
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001

By email: privacy@alrc.gov.au

Dear Commissioner McDonald

Serious Invasions of Privacy in the Digital Era Discussion Paper

1. Women's Legal Services NSW (WLS NSW) thanks the Australian Law Reform Commission (ALRC) for its work on this issue and for the opportunity to comment on its Serious Invasions of Privacy in the Digital Era Discussion Paper (Discussion Paper).

2. WLS NSW is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims compensation, care and protection, human rights and access to justice.

3. In summary, we recommend

   3.1 Recognition of the many forms of abuse of technology discussed in this submission as forms of violence against women.

   3.2 The principle 'privacy protection is an issue of shared responsibility' should not apply in situations of domestic and/of family violence or sexual violence.

   3.3 'The nature of the relationship between the parties' should be considered in the list of factors used to determine reasonable expectation of privacy.

   3.4 There should be a rebuttable presumption that a matter of a sexual nature where consent is in dispute meets the 'highly offensive or distressing or harmful' threshold and it then falls to the defendant to prove otherwise.

   3.5 The seriousness threshold should be met in a matter of a sexual nature where

consent is in dispute irrespective of whether it is shared with one person or more widely.

3.6 The balancing of rights and public interest test should be a defence.

3.7 If the public interest test is to be one of the elements of the action then it should be worded to make clear that the plaintiff does not need to provide lengthy pleadings on the issue of public interest, but rather can simply state it is not in the public interest (or privacy outweighs freedom of expression). It should then fall to the defendant to prove that it is in the public interest or freedom of expression outweighs privacy. If the defendant argues public interest or freedom of expression outweighs privacy, the plaintiff should at this point be able to present more extensive arguments about this issue.

3.8 The time limit to bring a cause of action for serious invasion of privacy should be:
(a) one year from the date a plaintiff becomes aware of the invasion of privacy; or
(b) six years from the date on which the invasion of privacy occurred, whichever is the latter.

3.9 If this is not adopted, in the alternative we recommend the time limit to bring a cause of action for serious invasion of privacy should be:
(a) one year from the date a plaintiff became aware of the invasion of privacy; or
(b) three years from the date on which the invasion of privacy occurred, whichever is the latter.

3.10 Extensions of time should be granted where there is a disability. Once the disability ceases there should be a three-year time limit from that date.

3.11 If the invasion of privacy occurred when the victim was a child, the time limit starts running from when the victim turns 18 years.

3.12 There should be an ultimate time bar of thirty years.

3.13 The ALRC's proposed condition on internet intermediaries wishing to access a safe harbour scheme to 'remove or take reasonable steps to remove material that invades a person's privacy, when given notice' must occur in a timely fashion.

3.14 It should be required by law or regulation that internet intermediaries must take action against those who breach another's privacy. There should be a requirement the internet intermediary provides reasons if they do not take such action. There should be consequences for an internet intermediary if they fail to take action without good reason.

3.15 Noting Alternative Dispute Resolution (ADR) may not be appropriate in all circumstances, an offer to engage in ADR should not automatically mitigate damage.

3.16 There should be a rebuttable presumption that the aggravating factor of 'special or additional embarrassment, harm, distress or humiliation' threshold is met when the serious invasion of privacy occurs in the context of domestic or family violence or where it involves material of a sexual nature where consent is in dispute.

3.17 Exemplary damages should be a separate head of damages and capped.

3.18 Local Courts should be given the power to grant stand-alone injunctive orders, such as take down orders and/or deliver up orders.

3.19 In the alternative, amend the *Crimes (Domestic and Personal Violence) Act 2007 (NSW)* so that an injunctive order, such as a take down order or deliver up order, can be made at the same time as an Apprehended Violence Order (domestic or personal).

3.20 In the Local Court or in a tribunal or tribunal-like setting, each party should bear their own costs unless the matter is deemed frivolous or vexatious or a party displays unreasonable conduct during the course of the proceedings.

3.21 In other courts where high level costs are involved, costs should follow the event.

3.22 Where a person has a prima facie case but is an impecunious litigant there should be technical assistance available to assist them in running their case.

3.23 Legal Aid should be available, particularly in a matter that involves domestic and/or family violence or sexual violence, subject to a means test. We note a benefit of access to legal aid is the indemnity against costs for legally aided clients.

3.24 Fee waivers and exemptions for court fees associated with a cause of action founded on tort, such as filing fees, subpoenas and other fees, must be available.

3.25 The proposed new Australian Privacy Principle which would provide a mechanism for the destruction or de-identification of personal information should require an APP entity to take steps to correct records with regard to third parties with which it has shared the personal information. Steps should include informing third parties in writing in a timely manner and requiring third parties that have forwarded the information on to others to do the same.

3.26 A regulator should be empowered to order an organisation to remove private information about an individual, whether provided by that individual or a third party, from a website or online service controlled by that organisation where:
(a) an individual makes a request to the regulator to exercise its power;
(b) the individual has made a request to the organisation and the request has been rejected or has not been responded to within a reasonable time; and
(c) the regulator considers that the posting of the information constitutes a serious invasion of privacy, having regard to freedom of expression and other public interests.

3.27 Referrals to mediation or conciliation are only made after an assessment that such a referral is appropriate.

3.28 There should be the option of lawyer-assisted ADR.

3.29 Matters involving serious threats or harassment relating to a person's sex, race, religion, sexual orientation, gender identity, intersex status, HIV/AIDS infection or disability should be excluded from referral to mediation or conciliation unless the applicant requests a referral.

3.30 Matters relating to sexual harassment or other forms of sexual violence are not referred to mediation or conciliation.

3.31 Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse backgrounds and people with disability should have the opportunity of a face-to-face conciliation, preferably in their local area.

3.32 The proposed E-Safety Commissioner's function should be extended to include vulnerable people as well as children. Victims of domestic and/or family violence or sexual violence should be included in 'vulnerable people'.

Serious Invasions of privacy – a form of violence against women

4. As outlined in our submission in response to the Serious Invasions of Privacy in the Digital Era Issues Paper (Issues Paper), we are deeply concerned by the growing use of technology to shame, humiliate, intimidate and/or harass women, that is, to perpetrate violence against women. Through our legal service we regularly hear how technology is being used in this way, for example, through the recording of intimate images without a woman's free and informed consent or the disclosing of intimate images to a third party/parties without a woman's free and informed consent.

5. There needs to be recognition of the many forms of abuse of technology discussed in this submission as forms of violence against women.

6. We note the ALRC's comment in the Discussion Paper that 'there is a strong framework in family law to protect individuals from harassment including harassment that occurs via electronic form.'[1] We acknowledge the important work of the ALRC in prioritising safety and a better understanding and recognition of family violence in family law. However, the comment in the Discussion Paper is not consistent with our experiences. In our experience, despite the 2011 amendments to the *Family Law Act*, which we commend, there continue to be insufficient protections for victims of harassment through family law mechanisms.

7. Current Australian civil and criminal laws dealing with the use of technology to shame, humiliate, intimidate and/or harass women, are unclear, inadequate and potentially ineffective. Sanctions may be disproportionate to the distress caused by a matter becoming public by being heard in court.

8. Laws must be developed to adequately respond to the misuse and abuse of new and emerging forms of technology.

9. We welcome the inclusion of most of the guiding principles for the proposed reform in this Inquiry about serious invasions of privacy. With respect to Principle 3, privacy being balanced with other important interests, we believe these should include the right to equality, which includes the right to be free from violence; and the right to security. This is discussed in further detail in our submission in response to the Issues Paper.

10. We note the inclusion of a new principle: 'privacy protection is an issue of shared responsibility'. We are concerned about the inclusion of such a principle in the context of domestic and/or family violence where there is an imbalance of power and coercion and

[1] ALRC, *Serious Invasions of Privacy Discussion Paper*, March 2014 at para 3.27.

controlling behaviour.

11. A victim of domestic and/or family violence may not be able to change the password on her computer because, for example, her ex-partner has control of the computer and the finances. Alternatively, she may not know how to change the password and it may take time to identify the issue and seek help.

12. Some women may have taken several steps to change their password, including changing their passwords several times and the ex-partner continues to find ways to access their private information. In the case of a mobile phone number, as family law orders may require a mobile phone number so the parent can be contacted, it is not always possible to change a phone number.

13. Responsibility should not fall to the victim to ensure their privacy is protected. Perpetrators of violence should be held accountable for their actions.

Recommendations

1. Recognition of the many forms of abuse of technology discussed in this submission as forms of violence against women.

2. The principle 'privacy protection is an issue of shared responsibility' should not apply in situations of domestic and/of family violence or sexual violence.

New tort in a New Commonwealth Act

14. We support Proposal 4.1, that is, a statutory cause of action for serious invasion of privacy being contained in a new Commonwealth Act and Proposal 4.2, that the cause of action should be described in the new Act as an action in tort.

15. We support having one tort which may include different types of invasion and fault. We note Proposal 5.1 includes:
'(a) intrusion upon the plaintiff's seclusion or private affairs (including by unlawful surveillance); or
(b) misuse or disclosure of private information about the plaintiff (whether true or not)'.

16. We are unclear if such a tort would capture instances where a threat to share private information may be made but there is no proof of publication. See scenario 1 below.

Scenario 1

X (female) and her then partner, Y (male) filmed themselves having sex. Post-separation Y allegedly sent the recording to Z (third person). X was contacted by Z who made comments that she should sleep with him if she does not want the material circulated further.

a. Would X have a cause of action in tort if there was a sex tape but it was not sent to Z and Z was informed of its existence and made empty threats?

c. Would injunctive relief be available if X is without proof of the publication?

17. It is important there are protections such that there is a remedy to the situation outlined in Scenario 1.

Reasonable expectation of privacy

Nature of relationship

18. In determining whether a person in the position of the plaintiff would have a reasonable expectation of privacy in all of the circumstances we recommend another factor be included in Proposal 6.2, namely, 'the nature of the relationship between the parties'. This is particularly important in situations of domestic and/or family violence as outlined in the comments above regarding the proposed principle of privacy as an issue of shared responsibility.

19. We refer to section 44(2)(c) *Victims Rights and Support Act* as an example of how 'the nature of the relationship' has been considered in other contexts. That section considers 'the nature of the relationship between the victim and the person or persons by whom the act of violence is alleged to have been committed' with regards to reporting to police within a reasonable time.

20. We submit that in cases of family and/or domestic violence it is reasonable that victims of such violence should have a higher expectation of privacy. Scenario 2 below highlights this as well as the importance of including 'the nature of the relationship' in the considerations discussed in Proposal 6-2.

Scenario 2

X (female) & Y (male) are separated. X is listed as the protected person in a final AVO against Y due to domestic violence. X fled and Y does not know X's current address which has remained undisclosed through court proceedings (hence, no orders stipulating that Y is not to come near her home). Y finds out X's address through technology, for example, logging in to X's personal accounts (such as Ebay or Centrelink), using spyware or giving their children phones with tracking software. Y parks his car outside X's house – is her address private information and if yes, is the breach serious?

Scenario 3

X (female) and Y (male) are separated and have a child. Y perpetrated violence against X throughout their relationship. When X collects the child, X films Y in order to feel safe and to deter him from acting out or causing her harm. How would this matter be dealt with under the proposed new tort?

Consent and means used

21. We are concerned by the inclusion in Proposal 6-2 of '(h) whether the plaintiff consented to the conduct of the defendant'.

22. In cases of domestic and/or family violence consent may not always be free and informed as outlined in Scenario 4 below.

Scenario 4

X (female) and Y (male) are in a relationship that involved domestic violence. Y recorded himself and X having sex. X was aware of the recording but did not feel she could say no in the context of a violent relationship. Y uses this video as an ongoing threat. X is isolated from her family who all live overseas. Y often threatens to send it to her family, bringing her shame if she ever left him or misbehaved. X called police after a physical altercation involving Y. X regretted calling the police, not wanting to get in trouble with Y, so X said nothing when police arrived. Both parties had injuries (X's being defensive). X was ultimately charged with assault and property damage and the police applied for an AVO for Y's protection. X consented to the AVO which had been used by Y as a coercive tool against her.

23. This scenario demonstrates the importance of including 'the nature of the relationship' as a factor in Proposal 6-2. It is important to correctly identify the primary aggressor and the primary victim.

24. In circumstances where a woman consented, for example, to the distribution of a sex tape but later wants it taken down, consent must be taken to be revoked.

25. We understand Proposal 6-2(h) to require consent for each action. For example, if a woman freely agrees to the filming of a sex tape in the context of an intimate relationship, further consent must be obtained before sharing such a tape with a third party.

26. With respect to '(b) the means used to obtain the private information or to intrude upon seclusion, including the use of any device or technology', we submit it should make no difference if the information was obtained by accessing an ex-partner's account through a password known from the relationship, auto-filled or saved on a device, pre-logged in, guessed or hacked. Once a relationship ends, so too should consent to access private information.

27. Where access to private information is required once the relationship ends, for example, where former intimate partners run a business together, it should be presumed that explicit consent to continue accessing relevant private information is required.

28. We frequently see cases where in the context of domestic and family violence, a partner or ex-partner may deliberately invade a woman's privacy with the intention of causing emotional distress as a continuation of violence. We submit that her ex-partner's knowledge of a password should not prevent the woman from having an action under the proposed tort.

Scenario 5

X (female) and Y (male) are separated. Y logs into X's private email address using the password. Y sends emails to X's workmates and family members overseas saying rude and offensive comments. All emails are deleted after being sent so X is unaware they have been sent. X's family begins to alienate her without X understanding why. X does not find out about the abusive work emails until a colleague makes a formal complaint about her to her employer.

29. We note emotional harm caused intentionally may present in ways other than a psychiatric illness. It can include damage in the form of a breakdown of relationships with family, work colleagues and/or friends as a result of efforts to alienate the woman from these networks. It is therefore important that a serious invasion of privacy tort takes into account damage caused as a result of intentional emotional harm other than a psychiatric illness.

Recommendation

3. 'The nature of the relationship between the parties' should be considered in the list of factors used to determine reasonable expectation of privacy.

Seriousness

30. We support a 'serious' threshold for the proposed new tort of invasion of privacy.

31. We submit there should be a rebuttable presumption that a matter of a sexual nature where consent is in dispute meets the 'highly offensive or distressing or harmful' threshold and it then falls to the defendant to prove otherwise.

32. We submit a 'matter of a sexual nature' includes images as well as information.

33. The seriousness threshold should be met in a matter of a sexual nature where consent is in dispute irrespective of whether it is shared with one person or more widely.

34. We note the test for the seriousness threshold is 'whether the invasion of privacy was likely to be highly offensive, distressing or harmful to a person of ordinary sensibilities in the position of the plaintiff.'

35. What is serious for one person may not be serious for another. In situations of domestic and/or family violence fear may be instilled by a look or a word which has significant meaning for a particular victim, but may seem harmless to someone else.

36. Would, for example, the seriousness threshold be met in scenarios 2 and 3 above?

37. We also note that in Aboriginal and Torres Strait Islander communities it may be highly offensive or distressing or harmful to show images of a deceased person. With advances in technology it is much easier to do this. This can be addressed in some circumstances by providing a warning that it may contain images and voices of deceased persons. Further consideration should be given to this issue in this inquiry.

38. We support Proposal 7-2 that 'the plaintiff should not be required to prove actual damage to have an action under the new tort'.

Recommendations

4. There should be a rebuttable presumption that a matter of a sexual nature where consent is in dispute meets the 'highly offensive or distressing or harmful' threshold and it then falls to the defendant to prove otherwise.

5. The seriousness threshold should be met in a matter of a sexual nature where

consent is in dispute irrespective of whether it is shared with one person or more widely.

Public interest

39. While we acknowledge the need for a balancing of rights test, that is, between the right to privacy and the right of freedom of expression as well as a public interest test, we submit the burden of proof should fall to the defendant. We therefore do not support Proposal 8-1. Instead the balancing of rights and public interest test should be a defence. We believe the defendant should bear the burden of proof as they would be in the best position to provide evidence about this. Given it is proposed that the invasion of privacy must be serious we submit this would limit unmeritorious claims.

40. We refer to our submission in response to the Issues Paper for a detailed discussion of the balancing of the rights of freedom of expression, privacy, equality and freedom from violence and security of person.

41. If the public interest test is to be one of the elements of the action then it should be worded to make clear that the plaintiff does not need to provide lengthy pleadings on the issue of public interest, but rather can simply state it is not in the public interest (or privacy outweighs freedom of expression). It should then fall to the defendant to prove that it is in the public interest or freedom of expression outweighs privacy. If the defendant argues public interest or freedom of expression outweighs privacy, the plaintiff should at this point be able to present more extensive arguments about this issue.

Recommendations

6. The balancing of rights and public interest test should be a defence.

7. If the public interest test is to be one of the elements of the action then it should be worded to make clear that the plaintiff does not need to provide lengthy pleadings on the issue of public interest, but rather can simply state it is not in the public interest (or privacy outweighs freedom of expression). It should then fall to the defendant to prove that it is in the public interest or freedom of expression outweighs privacy. If the defendant argues public interest or freedom of expression outweighs privacy, the plaintiff should at this point be able to present more extensive arguments about this issue.

Limitations

42. Proposal 9-4 states:
'A person should not be able to bring an action under the new tort after either
(a) one year from the date on which the plaintiff became aware of the invasion of privacy, or
(b) three years from the date on which the invasion of privacy occurred, whichever comes earlier.
In exceptional circumstances the court may extend the limitation period for an appropriate period, expiring no later than three years from the date when the invasion occurred'.

43. WLS NSW supports the ALRC's proposal of a limitation that runs from the date a plaintiff

became aware of the invasion of privacy. This is in line with current laws that allow an extension by up to one year after an applicant becomes aware of 'any of the material facts of a decisive character relating to the cause of action which were not within the means of knowledge of the applicant'.[2]

44. However, we strongly oppose the absolute expiration of the limitation period three years from the date on which the invasion of privacy occurred. We submit there is no basis in the current NSW statutory regime for the absolute expiration of the limitation period three years from the date on which the cause of action accrues and in fact such a strict application of a limitation period is inconsistent with the *Limitations Act 1969 (NSW)* ('*Limitations Act')*.

45. The *Limitations Act* allows for long periods where the limitation period is suspended or extended.

46. For example, Section 52 of the *Limitations Act* provides that where a person has a cause of action, and the limitation period for that cause of action has commenced to run, and the person is under a disability, the running of the limitation period is suspended for the duration of the disability. Once the disability ceases there is then a three-year time limit from that date.

47. In some cases of domestic and/or family violence the impact of the violence may be so debilitating that the victim may be under a disability for many years. The perpetrator of this violence should not be able to benefit from the woman's disability such that the victim is not able to pursue a cause of action in the form of a tort in the proposed three-year time limit.

48. Additionally, there are significant and well recognised barriers in victims of domestic and/or family violence and sexual violence reporting such matters. It is common to allow for extensions of time or impose longer time limits for matters involving domestic violence and sexual assault.[3]

49. Moreover, in light of developments with technology and many products relating to remote access of another's mobile device being described as 'invisible' so the victim is unaware there has been a serious invasion of privacy, there is a significant likelihood that a victim of a serious invasion of privacy may not become aware of the invasion until well after the proposed three-year timeframe.

50. Section 51 of the *Limitations Act* provides for an ultimate bar to bringing a cause of action. An action is not maintainable if brought after the expiration of a limitation period of thirty years running from the date from which the limitation period for that cause of action runs.

51. WLS NSW recommends that if an ultimate bar is to be placed on bringing a cause of action, it should be a limitation period of thirty years. It may be that the ultimate bar is limited to particular circumstances, for example, where the invasion of privacy occurs in the context of domestic and/or family violence or sexual violence.

52. Case study 1 below highlights the need to extend the time limit beyond what is included

[2] *Limitations Act 1969 (NSW*) Section 58(2)
[3] For example, *Victims Rights Support Act 2013 (NSW)* Sections 40(5) and (7).

in Proposal 9-4.

Case study 1

Annabelle discovered a sex video that was non-consensually filmed of her on the internet in 2014. The film was posted in 2007. Annabelle sustained a serious psychological injury as a result and was unable to continue to work. Annabelle would not be able to claim under the proposed tort due to the time limit.*

** Based on the experiences of clients but not their real names.*

53. We further submit that where a serious invasion of privacy has occurred when the victim is a child, the time limit should not start running until the victim is 18 years old.

54. We note that the general time limit in NSW for a cause of action founded on tort is six years.[4] We further note there is a six-year time limit to seek a civil remedy for unlawful interception or communication.

55. For consistency, we therefore recommend the time limit to bring a cause of action for serious invasion of privacy should be:
(a) one year from the date a plaintiff becomes aware of the invasion of privacy; or
(b) six years from the date on which the invasion of privacy occurred, whichever is the latter.

56. If this is not adopted, in the alternative we recommend the time limit to bring a cause of action for serious invasion of privacy should be:
(a) one year from the date a plaintiff became aware of the invasion of privacy; or
(b) three years from the date on which the invasion of privacy occurred, whichever is the latter.

57. Extensions of time should be granted where there is a disability. Once the disability ceases there should be a three-year time limit from that date.

58. If the invasion of privacy occurred when the victim was a child, the time limit starts running from when the victim turns 18 years.

59. There should be an ultimate time bar of thirty years.

Recommendations

8. The time limit to bring a cause of action for serious invasion of privacy should be:
(a) one year from the date a plaintiff becomes aware of the invasion of privacy; or
(b) six years from the date on which the invasion of privacy occurred, whichever is the latter.

9. If this is not adopted, in the alternative we recommend the time limit to bring a cause of action for serious invasion of privacy should be:
(a) one year from the date a plaintiff became aware of the invasion of privacy; or
(b) three years from the date on which the invasion of privacy occurred, whichever is the

[4] *Limitations Act (NSW)* Section 4(1)(b)

latter.

10. Extensions of time should be granted where there is a disability. Once the disability ceases there should be a three-year time limit from that date.

11. If the invasion of privacy occurred when the victim was a child, the time limit starts running from when the victim turns 18 years.

12. There should be an ultimate time bar of thirty years.

Defences and exemptions

60. We support Proposal 10-2 that 'the new Act should provide a defence for conduct incidental to the exercise of a lawful right of defence of persons or property where that conduct was proportionate, necessary and reasonable'.

Scenario 6

X (female) and Y (male) are separated; X is the protected person against Y in a final AVO due to domestic violence. X finds out Y has a new girlfriend, X contacts her to warn her that Y is a perpetrator of serious domestic violence. How would this matter be dealt with under the proposed new tort?

61. In scenario 6 above we submit that by 'X' warning the new partner about the ex-partner this is likely conduct that is proportionate, necessary and reasonable.

Safe harbour for internet intermediaries

62. Proposal 10-7 recommends the new Act provides a safe harbour scheme to protect internet intermediaries from liability for serious invasions of privacy committed by third party users of their services.

63. If such a scheme proceeds there will need to be conditions placed on internet intermediaries. We support the conditions proposed by the ALRC, adding that 'the remov[al] or tak[ing] of reasonable steps to remove material that invades a person's privacy, when given notice' must occur in a timely fashion.

64. We further recommend internet intermediaries take action against those who breach another's privacy, for example, by blocking their account. We recommend this be included as a law or regulation and that there be a requirement the internet intermediary provide reasons if they do not take such action. Further, there should be consequences for an internet intermediary if they fail to take action without good reason.

Recommendations

13. The ALRC's proposed condition on internet intermediaries wishing to access a safe harbour scheme to 'remove or take reasonable steps to remove material that invades a person's privacy, when given notice' must occur in a timely fashion.

14. It should be required by law or regulation that internet intermediaries must take action against those who breach another's privacy. There should be a requirement the internet intermediary provides reasons if they do not take such action. There should be consequences for an internet intermediary if they fail to take action without good reason.

Remedies

65. We support Proposal 11-1 that 'the new Act should provide that courts may award compensatory damages, including damages for the plaintiff's emotional distress, in an action for serious invasion of privacy'.

66. We note that attempts to resolve a matter, for example, through alternative dispute resolution (ADR) may mitigate damages. In cases of domestic and/or family violence or sexual violence, ADR may not be appropriate. This will be discussed further in the section on a complaints mechanism below. An offer to engage in ADR should therefore not automatically mitigate damage.

67. In order to clearly convey to the community that domestic and family violence are unacceptable, there should be a rebuttable presumption that the aggravating factor of 'special or additional embarrassment, harm, distress or humiliation' threshold is met when the serious invasion of privacy occurs in the context of domestic or family violence or where it involves material of a sexual nature where consent is in dispute.

68. This presumption is also warranted because domestic and family violence and sexual violence are matters of such a serious nature.

69. We welcome the inclusion of exemplary damages as outlined in Proposal 11-5. We believe using exemplary damages in the context of violence against women would send a powerful message that violence against women is unacceptable in our society.

70. While agreeing exemplary damages should be capped, we do not support their inclusion with other damages as suggested in Proposal 11-6. This is because we fear awards for non-economic loss will be kept low in the serious invasions of privacy tort to allow the upper limits of the tort to be reserved for exemplary damages. We submit the damages should be on a par with defamation with an additional capped amount for exemplary damages.

Injunctions

71. We support Proposal 11-9 that 'the new Act should provide that courts may award an injunction, in an action for serious invasion of privacy'.

72. We also support Proposal 11-10 that 'the new Act should provide that courts may order the delivery up and destruction or removal of material, in an action for serious invasion of privacy'.

73. However, given a tort is usually a very expensive cause of action and not necessarily accessible to all, it is important to also provide an avenue for injunctive relief at the Local Court which is just, quick and cheap.

74. We recommend that Local Courts be given the power to grant stand-alone injunctive

orders such as take down orders and/or deliver up orders.

75. A second option is the amending of the *Crimes (Domestic and Personal Violence) Act 2007 (NSW)* so that an order, such as a take down order or deliver up order, can be made at the same time as an Apprehended Violence Order (AVO) (domestic or personal). We envisage an application for these orders could be made at anytime throughout the AVO proceeding, as is the case for ancillary property orders. In police AVO applications, the Police Prosecutor should request such orders.

76. The disadvantage of the application being tied to the AVO application is the need for the Applicant to establish fear on a reasonable basis for an AVO to be made. This may mean that a take down or deliver up order fails only because fear is not proven. We submit a failure to establish fear should not prevent a just, quick and cheap remedy in the form of a take down or deliver up order in the Local Court.

77. While noting that obtaining injunctive relief from a Local Court would be a significant new power, we submit the significant changes in technology and the potential to use such technology as a form of violence against women warrants such a power.

Recommendations

15. Noting ADR may not be appropriate in all circumstances, an offer to engage in ADR should not automatically mitigate damage.

16. There should be a rebuttable presumption that the aggravating factor of 'special or additional embarrassment, harm, distress or humiliation' threshold is met when the serious invasion of privacy occurs in the context of domestic or family violence or where it involves material of a sexual nature where consent is in dispute.

17. Exemplary damages should be a separate head of damages and capped.

18. Local Courts should be given the power to grant stand-alone injunctive orders such as take down orders and/or or deliver up orders.

19. In the alternative, amend the *Crimes (Domestic and Personal Violence) Act 2007 (NSW)* so that an injunctive order, such as a take down order or deliver up order, can be made at the same time as an Apprehended Violence Order (domestic or personal).

Costs

78. In the Local Court or in a tribunal or tribunal-like setting, each party should bear their own costs unless the matter is deemed frivolous or vexatious or a party displays unreasonable conduct during the course of the proceedings.

79. In other courts where high level costs are involved, we recommend costs follow the event. Costs include the significant expense in gathering evidence in such a technical area. For people with low incomes often the only way to access these kinds of remedies is when law firms act on a no win - no fee basis. If costs are generally not awarded, it would be most unlikely for such law firms to act on that basis. Accordingly, we submit that if costs follow the event in such matters, this will remove one of the barriers to accessing justice.

80. Where a person has a prima facie case but is an impecunious litigant there should be technical assistance available to assist them in running their case.

81. Legal Aid should also be available, particularly in a matter that involves domestic and/or family violence or sexual violence, subject to a means test. We further note a benefit of access to legal aid is the indemnity against costs for legally aided clients.

82. Fee waivers and exemptions for costs associated with a cause of action founded on tort, such as filing fees, subpoenas and other fees, must be available.

Recommendations

20. In the Local Court or in a tribunal or tribunal-like setting, each party should bear their own costs unless the matter is deemed frivolous or vexatious or a party displays unreasonable conduct during the course of the proceedings.

21. In other courts where high level costs are involved, costs should follow the event.

22. Where a person has a prima facie case but is an impecunious litigant there should be technical assistance available to assist them in running their case.

23. Legal Aid should be available, particularly in a matter that involves domestic and/or family violence or sexual violence, subject to a means test. We note a benefit of access to legal aid is the indemnity against costs for legally aided clients.

24. Fee waivers and exemptions for court fees associated with a cause of action founded on tort, such as filing fees, subpoenas and other fees, must be available.

Breach of confidence actions for misuse of private information

83. We support Proposal 12-1: 'If a statutory cause of action for serious invasion of privacy is not enacted, appropriate federal, state, and territory legislation should be amended to provide that, in an action for breach of confidence that concerns a serious invasion of privacy by the misuse, publication or disclosure of private information, the court may award compensation for the claimant's emotional distress'.

Surveillance devices

84. In considering surveillance devices it is particularly important to carefully consider victims of domestic and family violence, sexual violence and other forms of stalking.

85. We support proposal 13-2 that 'surveillance device laws should include a technology neutral definition of 'surveillance device'.

Harassment

86. We support the clarification and consolidating of existing criminal offences for harassment. It is important that should this Proposal proceed there is no reduction in protection but rather a strengthening of protections.

87. Some protection currently exists, for example section 474.17 *Criminal Code Act 1997*

(Cth) provides that it is an offence to 'use a carriage service to menace, harass or cause offence'. However, where threats are made online and sometimes where they are made by text message, clients often tell us that police have told them there is no evidence or it is too difficult to obtain evidence to prove the threats were made by the alleged perpetrator and so no charges are laid.

Case study 2

Susan was in a violent relationship with Thomas for a short period. During that time Susan and Thomas lived interstate with Susan's children.*

After they separated, Thomas went through Susan's friends' list on Facebook and added her friends to a fake Facebook account he created in Susan's name with her photo and personal details. Susan's friends thought she must have created a new account and accepted the requests. Thomas began posting messages as Susan. He also started private messaging Susan's friends pretending to be Susan, saying hurtful and offensive things that ruined many of her friendships beyond repair.

Once Susan realised what was happening, she contacted the police in the state she was living. The police applied for a protection order against Thomas, including a condition that Thomas refrain from any form of communication with or about Susan or her children. Susan also reported the conduct to Facebook who eventually removed the fake account after several months.

Susan lost her job and her children started being bullied at school due to the comments Thomas had spread through the fake account. Susan decided to move to NSW to give her children and herself a fresh start.

Once Susan moved, four new fake accounts were made in her name. The person posing as Susan started making comments that Susan would harm her children. Susan called the police in the state in which Thomas was located to report the breaches and provided screen shots of the comments.

The police told her there was nothing they could do because they had no proof it was Thomas creating the accounts and posting the messages nor from which state the comments were being published. They also informed her as she was located in NSW, it was outside their jurisdiction and she should contact the NSW Police.

Susan contacted the NSW Police and was told there was nothing they could do and that if the person making the publications was in another state, it was that state's jurisdiction.

Susan found out that the police could put in a formal request to the US Embassy to put in a request to Facebook for the relevant information, but this would likely take several months and even if Facebook agreed to assist and pass on the information, they would not necessarily disclose from where the posts originated.

To be charged with a breach of the protection order, the acts must occur within the jurisdiction in which the protection order had been made. The police would also need to apply for a warrant to seize the accused's computer as evidence and it would need to be processed by experts, which would also take months.

Offensive posts continue to be made about Susan and her children, impacting upon their lives and mental wellbeing.

**Based on the experiences of clients but not their real names.*

New regulatory mechanisms

88. Proposal 15-2 recommends:

> 'A new Australian Privacy Principle (APP) should be inserted into the *Privacy Act 1988 (Cth)* that would:
> (a) require an APP entity to provide a simple mechanism for an individual to request destruction or de-identification of personal information that was provided to the entity by the individual; and
> (b) require an APP entity to take reasonable steps in a reasonable time, to comply with such a request, subject to suitable exceptions, or provide the individual with reasons for its non-compliance'.

89. We support recommendation 15-2.

90. Further, we recommend this proposed new Australian Privacy Principle require an APP entity to take steps to correct records with regard to third parties with which it has shared the personal information. Steps should include informing third parties in writing in a timely manner and requiring third parties that have forwarded the information on to others to do the same.

91. We recommend that a regulator be empowered to order an organisation to remove private information about an individual, whether provided by that individual or a third party, from a website or online service controlled by that organisation where:
(a) an individual makes a request to the regulator to exercise its power;
(b) the individual has made a request to the organisation and the request has been rejected or has not been responded to within a reasonable time; and
(c) the regulator considers that the posting of the information constitutes a serious invasion of privacy, having regard to freedom of expression and other public interests.

92. We submit should the regulator have these powers this is a possible remedy in a toolkit of remedies with respect to case study 2 above.

Recommendations

25. The proposed new Australian Privacy Principle which would provide a mechanism for the destruction or de-identification of personal information should require an APP entity to take steps to correct records with regard to third parties with which it has shared the personal information. Steps should include informing third parties in writing in a timely manner and requiring third parties that have forwarded the information on to others to do the same.

26. A regulator should be empowered to order an organisation to remove private information about an individual, whether provided by that individual or a third party, from a website or online service controlled by that organisation where:
(a) an individual makes a request to the regulator to exercise its power;
(b) the individual has made a request to the organisation and the request has been rejected or has not been responded to within a reasonable time; and
(c) the regulator considers that the posting of the information constitutes a serious invasion of privacy, having regard to freedom of expression and other public interests.

A complaints mechanism

93. WLS NSW supports a just, quick, cheap and accessible complaints mechanism, similar, for example, to how the Australian Human Rights Commission manages complaints.

94. We note reference to the Office of the Australian Information Commissioner's proposal for such a complaint mechanisms in the Discussion Paper but submit such a complaints mechanism should apply beyond APP entities which are mainly government agencies and large businesses.

95. WLS NSW supports the use of alternative dispute resolution (ADR) options such as mediation or conciliation in appropriate circumstances. However, we believe that it is essential that referrals to mediation or conciliation are made after an assessment that such a referral is appropriate, rather than automatically.

96. There should also be the option of lawyer-assisted ADR.

97. Matters involving serious threats or harassment relating to a person's sex, race, religion, sexual orientation, gender identity, intersex status, HIV/AIDS infection or disability should be excluded from referral to mediation or conciliation unless the applicant requests a referral.

98. WLS NSW opposes the referral of matters relating to sexual harassment or other forms of sexual violence to mediation or conciliation.

99. We note that in determining the best complaint mechanism it may not be possible to have an office in every state and territory. This should not preclude the establishing of a complaints mechanism. For example, we understand the Australian Human Rights Commission has an office based in Sydney but provides face-to-face conciliation services in the other capital cities and some regional areas.

100. While some people may be able to attend conciliation by telephone it is particularly important that Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse backgrounds and people with disability have the opportunity of a face-to-face conciliation, preferably in their local area.

Recommendations

27. Referrals to mediation or conciliation are only made after an assessment that such a referral is appropriate.

28. There should be the option of lawyer-assisted ADR.

29. Matters involving serious threats or harassment relating to a person's sex, race, religion, sexual orientation, gender identity, intersex status, HIV/AIDS infection or disability should be excluded from referral to mediation or conciliation unless the applicant requests a referral.

30. Matters relating to sexual harassment or other forms of sexual violence are not referred to mediation or conciliation.

31. Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse backgrounds and people with disability should have the opportunity of a face-to-face conciliation, preferably in their local area.

E-Safety Commissioner

101. As stated in the Discussion Paper, the Department of Communications is currently undertaking an inquiry into Online Safety for Children. As the Discussion Paper notes 'as part of that inquiry, the Department has proposed a Commissioner with the power to issue a notice requiring the removal of material that is likely to harm a child. Such a notice could, under the Department's proposal, be directed to either the internet intermediary or the individual who posted the material'.[5]

102. We welcome the establishment of a Commissioner with such powers and recommend consideration be given to extending the Commissioner's function to include vulnerable people as well as children. Victims of domestic and/or family violence or sexual violence should be included in 'vulnerable people'.

Recommendation

32. The proposed E-Safety Commissioner's function should be extended to include vulnerable people as well as children. Victims of domestic and/or family violence or sexual violence should be included in 'vulnerable people'.

We are happy for our submission to be made public. If you would like to discuss any aspect of this submission, please contact Liz Snell, Law Reform and Policy Coordinator on 02 8745 6900.

Yours faithfully,
Women's Legal Services NSW

Philippa Davis
Acting Principal Solicitor

[5] ALRC, *Serious Invasions of Privacy Discussion Paper*, March 2014 at para 15.35.