



domestic violence
LEGAL SERVICE

SUBMISSION

SERIOUS INVASIONS OF PRIVACY IN THE DIGITAL ERA (DP 80)

(An inquiry by the Australian Law Reform Commission)

Prepared by the Domestic Violence Legal Service and the
North Australian Aboriginal Justice Agency

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INTRODUCTION

The Domestic Violence Legal Service (DVLS) and the North Australian Aboriginal Justice Agency (NAAJA) welcome the opportunity to provide a joint submission on the ALRC's Serious Invasions of Privacy in the Digital Era (DP 80) inquiry.

Purpose

We strongly support the creation of a statutory cause of action for serious invasions of privacy.

Our submission focuses on drawing the attention of the Commission to the nature and impact of serious invasions of privacy in a domestic violence context, where both race and gender are added vulnerabilities.

The key aim of our submission is to alert the Commission to the ease with which domestic violence perpetrators in the Northern Territory are terrorizing victims using technology, the magnitude of the harm suffered by victims and the urgent need for strong and effective criminal and civil law remedies and strong regulatory responses to prevent such harms.

We call for strong avenues of redress aimed both at individuals who use digital technology to harass, control and intimidate their victims and at the companies and corporations whose operating models allow the uploading of graphic and sexually explicit material to websites and other digital platforms without either the knowledge or consent of the subject.

Our submission provides two recent real life case studies, gives an overview of some of the pornography web sites used to threaten and intimidate women, discusses how the women tried to get help and looks at limitations in the existing laws and procedures. We then briefly address some of the Commission's specific questions.

Context

DVLS is a free service for victims and people at risk of domestic violence and family violence in the Greater Darwin Region. The service operates under the auspices of the Northern Territory Legal Aid Commission and is funded by the Northern Territory Government. The service provides legal advice and representation in relation to obtaining domestic violence orders and related matters. The majority of clients are women, with around 34 per cent of casework clients identifying as Aboriginal and Torres Strait Islander and around 15 per cent as from a non-English speaking background.

NAAJA delivers high quality and culturally competent legal services to Aboriginal and Torres Strait Islander people in the Top End of the Northern Territory. As well as its core legal practice in criminal, civil and family law, NAAJA provides advocacy and justice-related services that aim to ensure that Aboriginal people have real access to justice.

Both DVLS and NAAJA are seeing increasing numbers of women who are suffering from serious invasions of privacy in a digital setting. The use of digital technology as a weapon in a domestic violence context is common, with perpetrators using technology to control and intimidate victims through various forms of cyberstalking: unwanted contact via phone, text, email, social media, use of spyware to monitor victims' communications, tracking technology to monitor victims' movements, and the use of communication technology to harass, intimidate and offend.

We note and endorse the Women's Legal Service Victoria and the Domestic Violence Resource Centre Victoria joint submission, and the Women's Legal Centre (ACT & Region) Inc submission to this inquiry

Case studies

Below are two recent case studies that show how easily perpetrators can harass and control their victims by uploading sexually explicit material which can then be readily accessed on the internet. This is possible, even when the relationship is over and where the victim and perpetrator live in different states. In one case, the woman's name and address were included with her images, putting her at real risk of physical harm as well as causing extreme emotional distress.

We are extremely grateful to our clients for their bravery in allowing their stories to be told in the hope these will inspire real and urgent change to our current laws and remedies.

A's Story

Ms A is a woman living in the Northern Territory. She was in a relationship with Mr B for over 10 years. Towards the end of their relationship, Mr B became increasingly emotionally and physically abusive. Ms A decided to end the relationship which had become so damaging. A few months later, Ms A discovered that Mr B had posted nude photographs which he had taken of her to a number of pornographic websites. The photographs were accompanied by Ms A's full name and address as well as offensive descriptions. These actions caused Ms A a great deal of distress and put her at risk of physical harm. She received messages to her social media account from strangers who had seen the photographs and she reported an unknown man loitering around her house. She also experienced depression, anxiety and panic attacks. Ms A wrote to the websites to ask if they would remove the photographs but they refused. It was only when Ms A obtained help from a community legal centre that the websites agreed to remove the photographs.

Ms A's experience is part of a growing trend in what has been described as 'revenge porn', where disgruntled ex-partners post nude photographs to specific websites along with identifying details and offensive messages. While many websites allow individual users to 'upload' photographs, there appear to be increasing numbers of websites, such as those in Ms A's case, which are specifically set up to facilitate revenge porn. The aim of these websites is to humiliate and denigrate the women whose images they publish. There are currently only limited avenues for Ms A to pursue legal action against the owners of the websites who published her images. Ms A believes that reforming the law to include a statutory cause of action for serious invasions of privacy would assist women such as herself whose privacy has been deliberately breached by revenge porn websites.

Sofia's story

Sofia is a professional in her mid-twenties. Early in 2014, her ex-boyfriend Darren threatened to upload a sexually explicit video of the two of them after she refused to reconcile with him.

Sofia had been in what she believed to be a loving relationship for two years. During this time, Sofia moved in with Darren and the explicit video which featured both of them was made. Sofia felt she was at a point in their relationship where she believed Darren was the love of her life and he, of all people, would never do wrong by her. She was initially hesitant about the idea of being filmed but Darren reassured her it would only ever be viewed by the two of them. She says, "I trusted him. I loved him. So I agreed."

Towards the end of their relationship, Sofia discovered Darren had been unfaithful. She was devastated and ended the relationship.

Once Darren realised there was nothing he could do to get her back, it seemed to trigger his vengeance. His way of getting even was to make believe that he had uploaded their intimate video onto the internet for everyone to see.

Sofia was devastated. She lives in a small town. Her work involves personal contact with a wide range of customers in a professional setting. She was terrified her customers might have seen the video. Not only would she be humiliated, but her professional reputation would be on the line. There was also a real possibility that the stress or shock of recognition from the video during an appointment could cause Sofia to make an error that could result in harm to the customer.

On the advice of a close friend, Sofia attended a domestic violence legal service. With their help, she was able to obtain an assurance from Darren that he had not uploaded the video, that he would not do so in future and that he would destroy the video.

Sofia says, "The fact that he would have been able to upload such an intimate video without my consent is unacceptable. The fact that absolutely anybody could do this same thing as a way to threaten an individual and to assert power over them is terrifying. Worst of all, I will never rest entirely easy that he did not post the video or that he may do so in the future"

"There has to be some way in which internet service providers, internet users and website hosts can be held accountable for what is posted on the internet and consent must always be required. Strong laws definitely need to be implemented to immediately stop this same type of invasion of privacy from happening to anybody else. In this day and age, millions of people can view a video within the first 24 hours of it being uploaded online. I hope that any form of protection for individuals that are put in place will take that into account."

The websites

Anyone with a mobile phone now has all the tools to make and disseminate pornography, including material featuring their current or former partner or even of a totally unknowing third party using images either made or uploaded without the knowledge or consent of the subject. In this context, serious invasions of privacy are prevalent.

Popular sites that we understand are used and accessible in Australia include:

1. www.myex.com

“Get Revenge! Naked Pics of Your Ex ... Get the dirt before you get hurt or submit your ex or your favorite celebrities and athletes”

2. www.imagefap.com

“ImageFap is the biggest adult porn pics site. Free porn pics of all niches and fetishes, teens, amateurs, anal, shemales, asian, gay. New free porn pics added ...”

3. www.ufym.com

“Welcome to Ufym.net! Upload and share files from your mobile or download files shared by others”

Uploaded material is usually given a title and such titles often feature degrading and derogatory references, sometimes including the name and location of the subject victim. Some sites provide for other visitors to the site to comment on uploaded material. These comments are generally degrading and obscene.

The sheer volume of material that is online, the ease with which it can be accessed (no need to sign in, no need to show how old you are, no need to pay) and the explicit and demeaning nature of the material all point to the need for urgent reform.

In cases where victims may not wish to pursue legal action against their former partners (particularly where children are involved), or where internet intermediaries refuse to remove pictures, it is imperative that some form of action or other remedy against internet intermediaries is possible.¹

¹ It was only as part of our research for this submission, that we became aware that a complaint can be made about these sites to the Australian Communications and Broadcast Authority on the basis that the content is “potential prohibited content” (ie there are no restricted access provisions and the content is likely to be Restricted Category 1 by virtue of “unsuitable to be viewed by a minor”) and that ACMA may take action in relation to the site’s operation in some circumstances.

We recommend that the Commission investigate possible amendments to the *Broadcasting Act 1992* and the National Classification Code to include ‘serious invasion of privacy’ as a basis for deeming material as “potential prohibited content” or “prohibited content”.

Some avenues of redress and their limitations

Criminal Code Act 1995 (Cth)

Clients of our services have initially approached Police for help. All have had hard evidence to show Police, either of the texts or the uploaded material. All have been told that because they had consented to the making of the material there was nothing Police could do.

In our view, these are circumstances which may ground a prosecution against individual perpetrators under section 474.17 of the *Criminal Code Act 1995 (Cth)* “Use Carriage Service to Menace Harass or Cause Offence.” We note the inquiry’s guiding principle that privacy protection is an issue of shared responsibility, and that education and training around existing laws is not strictly within the terms of reference. However, any contemplation of new legislation must be guided by the effectiveness of the existing legal framework. On this basis, we recommend that better training of Police both on the impact on victims of these crimes, how these crimes can constitute a form of domestic violence, and on the available criminal law remedies to help ensure victims get a better response.

Whether the internet intermediaries involved in creating and operating platforms displaying sexually explicit material might also be culpable under criminal law is beyond our expertise. We recommend that a review of the Criminal Code be conducted in light of the issues raised in our case studies, with regard to whether internet intermediaries can be held criminally liable, as well as looking to strengthen the powers of the regulators in relation to internet intermediaries who cause or permit serious invasions of privacy.

Domestic and Family Violence Act 2007 (NT)

Our clients have been able to obtain limited protection against the individual perpetrators through seeking novel forms of orders under the *Domestic and Family Violence Act 2007 (NT)* in the Court of Summary Jurisdiction. By relying not only on the provision under the Act that provides for orders to include restraints (s 21(1)(a)), but also the facility for orders imposing obligations (s 21(1)(b)) we were able to obtain orders in the following terms:

1. The defendant is restrained from posting, uploading or otherwise displaying, disseminating, duplicating or distributing any image of the protected person in any form whether electronic, digital, hard copy, video or any other form.

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2. Within 24 hours of service of this order, the defendant is to permanently delete and destroy any images or video of the protected person that are in the possession of the defendant or to which the defendant has access.

In addition, a domestic violence order in the Northern Territory can restrain the defendant from “intimidating” and “harassing” the protected person. This can provide protection from future threats to post or distribute material to which a reasonable expectation of privacy attaches as such threats may constitute harassment or intimidation.

Domestic violence orders are not effective until served, meaning if the perpetrator cannot be found the orders cannot be enforced. Further difficulties may include the ability of Police to devote resources to enforcing any alleged breach of such an order or in the Court finding a particular breach is enforceable.

The greater difficulty, and that which goes directly to why threats to upload personal material are so grave and damaging, is that a victim will never truly know if, or when, or to where the material has been uploaded.

Therefore, the most important area of legal or regulatory reform is ensuring that internet intermediaries are prevented from displaying intimate and graphic material without any requirement to show that the subject knows of, and has consented to, the display of the material.

Summary of responses to the Commission’s proposals

The proposal to create a new civil tort for serious invasions of privacy is welcomed as making available an important means of redress for victims of domestic violence, including those for whom race, gender and other attributes are factors in the invasion of privacy.

The limitations of a civil action in the domestic violence context are that such actions are typically slow, may be expensive and are not always readily accessible, especially to women who have suffered domestic violence, and who will often have a range of other barriers to accessing justice, including cultural barriers and economic means. Moreover, a civil action against an individual perpetrator will be futile where he or she is judgment proof, as may often be the case.

A further critical limitation is that it is unlikely the tort will provide (as we believe it should) for serious invasions caused by negligence and further that corporate respondents are likely to be protected by safe harbour provisions. This will severely limit the tort’s utility as a tool to protect women from domestic violence perpetrated by individuals and to protect women generally from being degraded and humiliated by the publication of sexually explicit images in an offensive and

degrading context (including denigration based on race or ethnic origin) without verification of their knowledge and consent to the publication.

For this reason, effective criminal sanctions, unified Commonwealth harassment law and strong regulatory responses are required to hold digital platform operators, as well as individual perpetrators, liable for facilitating serious invasions of privacy.

Underpinning our responses to the specific proposals is the principle that privacy is a public good which the State should assist private citizens to protect. Individual privacy concerns should outweigh considerations such as cost and convenience where serious invasions are likely to occur.

Further, in line with Australia's international treaty obligations, the State must make greater efforts as a matter of urgency to protect women from sexual violence and serious invasions of privacy in the digital environment.

Please see below specific responses to selected proposals.

Proposal 4–1 A statutory cause of action for serious invasion of privacy should be contained in a new Commonwealth Act (the new Act).

YES.

Proposal 4–2 The cause of action should be described in the new Act as an action in tort.

YES.

Proposal 5–1 First element of action: The new tort should be confined to invasions of privacy by:

- (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).

YES, but ensure at:

(a) "Intrusion" provides for unwanted contact, such as telephoning, texting, social media/facebook messaging. Critically, we would urge the Commission to ensure "intrusion" also cover the use of programs such as Spyware that monitor a person's telephone or computer, as this is emerging as a particularly invidious and disturbing form of domestic violence.

YES, but ensure at:

(b) The definition of “private information” provides for nude, partially nude and sexually explicit images of a person, whether or not such images were made by the subject or by another person and whether or not with or without the knowledge and consent of the subject.

We agree with the Commission’s conclusion that the use of “information” rather than “fact” [Discussion Paper 5.29] is to be preferred and that there be no requirement that the private information be true. We see this as covering situations where an otherwise innocuous photograph of a person is published but in a context or accompanied by other information which may be false or defamatory (e.g. upload of an innocuous photo of Ms Y to a pornographic website accompanied by derogatory sexual references).

We support the Commission’s conclusion that “misuse” not be confined to public disclosures [Discussion Paper 5.39]. We see this covering the common scenario where a domestic violence perpetrator will threaten or act to disclose private information to a new partner, close associates, colleagues, employers, or family members of the victim. While such disclosure is not public, the impact on the victim may be serious.

At Discussion Paper 5.40 (“False light and appropriation”) the Commission concludes that it is not necessary for appropriation of a person’s name or likeness to be covered by the new tort. We ask the Commission to consider the common scenario in domestic violence cases where the perpetrator hacks into the victim’s existing social media account or creates a false social media account in the name and or image of the victim and then posts material purporting to be authored by the victim. At DVLS this type of action is frequently seen and often extremely damaging to the victim. We therefore ask the Commission to consider that this is indeed a misuse of private information that should be actionable under the new tort.

Proposal 5–2 Second element of action: The new tort should be confined to intentional or reckless invasions of privacy. It should not extend to negligent invasions of privacy, and should not attract strict liability.

NO. We agree that the proposed tort should not attract strict liability, however recommend that the tort should extend to negligent invasions of privacy. If the tort does not, this may make it too difficult to hold internet intermediaries liable under the new tort.

In respect of internet intermediaries it is critical to put the onus onto the operator to ensure the material they allow to be broadcast does not constitute a serious invasion of privacy. Otherwise, they are likely to continue to operate as they currently do.

We acknowledge that this will require careful construction of the tort to ensure this aspect is confined to particular invasions of privacy such as the publication of sexually explicit images or film, images of a person accompanied by sexually explicit, demeaning or degrading references, or ordinary images of a subject accompanied by their personal details (such as address and phone number). Perhaps there could be a range of defences to negligent invasions of privacy to confine the tort so that the effect is reasonable and proportionate.

Counter arguments that it is too difficult and/or too expensive for internet intermediaries to monitor content when the obvious purpose of the site is to display sexually explicit material should not be accepted either as a defence or as reason why the tort should not capture this kind of negligence. The right to privacy should outweigh the ability to publish or allow the publication of sexually explicit or degrading material online without verification of the specific consent of the subject.

Proposal 5–3 The new Act should provide that an apology made by or on behalf of a person in connection with any invasion of privacy alleged to have been committed by the person:

(a) does not constitute an express or implied admission of fault or liability by the person in connection with that matter; and

(b) is not relevant to the determination of fault or liability in connection with that matter.

YES.

Proposal 5–4 Evidence of an apology made by or on behalf of a person in connection with any conduct by the person is not admissible in any civil proceedings as evidence of the fault or liability of the person in connection with that matter.

YES.

Proposal 6–1 Third element of action: The new tort should only be actionable where a person in the position of the plaintiff would have had a reasonable expectation of privacy, in all of the circumstances.

YES.

Proposal 6–2 The new Act should provide that, in determining whether a person in the position of the plaintiff would have had a reasonable expectation of privacy in all of the circumstances, the court may consider, among other things:

- (a) the nature of the private information, including whether it relates to intimate or family matters, health or medical matters, or financial matters;
- (b) the means used to obtain the private information or to intrude upon seclusion, including the use of any device or technology;
- (c) the place where the intrusion occurred;
- (d) the purpose of the misuse, disclosure or intrusion;
- (e) how the private information was held or communicated, such as in private correspondence or a personal diary;
- (f) whether and to what extent the private information was already in the public domain;
- (g) the relevant attributes of the plaintiff, including the plaintiff's age and occupation;
- (h) whether the plaintiff consented to the conduct of the defendant; and
- (i) the extent to which the plaintiff had manifested a desire not to have his or her privacy invaded

YES, but concur with the submission of the WLSV & DVRCV about concerns in relation to consent. We agree that considerable caution needs to be exercised where domestic violence is part of the context in which the invasion of privacy occurred. As noted by WLSV & DVRCV, consent may have been obtained under duress, or consent may have been limited to private use. The structure of the tort must account for these concerns.

Proposal 7–1 Fourth element of action: The new Act should provide that the new cause of action is only available where the court considers that the invasion of privacy was 'serious'. The new Act should also provide that in determining whether the invasion of privacy was serious, a court may consider, among other things, 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.

It should be sufficient that where a plaintiff had a reasonable expectation of privacy, the cause of action is available. In the alternative, the test proposed appears sufficiently flexible in that it incorporates a degree of subjectiveness, that is, if we rightly understand it, "in the position of the plaintiff" will include reference to gender, race, ethnic origin, culture and other characteristics, and circumstances such as domestic violence.

Proposal 7–2 The plaintiff should not be required to prove actual damage to have an action under the new tort.

YES. We strongly agree that a serious invasion of privacy is actionable *per se* and that proof of actual damage should not be required. The damage lies in the serious invasion of privacy where a person had reasonable expectation of privacy. In the case of the publication of intimate material, whether to another

individual or in the public domain, the harm is done and cannot be undone, and can also be difficult to quantify.

Proposal 8–1 Fifth element of action: The new Act should provide that the plaintiff only has a cause of action for serious invasion of privacy where the court is satisfied that the plaintiff's interest in privacy outweighs the defendant's interest in freedom of expression and any broader public interest. A separate public interest defence would therefore not be needed.

Where intimate material is published, and there was a reasonable expectation of privacy, it is unlikely that this would outweigh the defendant's interest in freedom of expression. However, a public figure, who is no less likely to be a victim of domestic violence than any other person, may find the public interest test a barrier to his or her cause of action, and this is an aspect that needs to be approached with caution.

Proposal 8–2 The new Act should include the following non-exhaustive list of public interest matters which a court may consider:

- (a) freedom of expression, including political communication;
- (b) freedom of the media to investigate, and inform and comment on matters of public concern and importance;
- (c) the proper administration of government;
- (d) open justice;
- (e) public health and safety;
- (f) national security;
- (g) the prevention and detection of crime and fraud; and
- (h) the economic wellbeing of the country.

YES.

Proposal 9–1 Federal, state and territory courts should have jurisdiction to hear an action for serious invasion of privacy under the new Act.

Question 9–1 If state and territory tribunals should also have jurisdiction, which tribunals would be appropriate and why?

There may be some advantages in terms of cost and less formality for disadvantaged litigants in approaching a Tribunal rather than a Court, however, currently in the Northern Territory the Administrative Appeals Tribunal sits infrequently and so is not as readily accessible as the courts.

Proposal 9–3 A cause of action for serious invasion of privacy should not survive for the benefit of the plaintiff's estate or against the defendant's estate.

The relatives of a person who suffers a serious invasion of privacy may be seriously affected by a breach of the nature illustrated in our case studies. Family members of the deceased should be able to bring an action, for example, children of a deceased parent who is the subject of sexually explicit material posted online.

Proposal 9–4 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.

NO. We ask the Commission to consider that this section effectively makes the time limitation one year. In the case of domestic violence matters, victims may have suffered and be suffering significant trauma, both as result of the serious invasion of privacy and other forms of domestic violence. In these circumstances, many women will find it hard to gain the necessary strength and resources to bring an action in such a relatively short time frame. Many will also rely on legal aid or community legal services, who have limited capacity and may need more time to act in the context of their limited resources and competing casework priorities.

Proposal 9–5 The new Act should provide that, in determining any remedy, the court may take into account:

- (a) whether or not a party took reasonable steps to resolve the dispute without litigation; and
- (b) the outcome of any alternative dispute resolution process.

YES, provided that there are clear exceptions where domestic violence, threats, or duress or other like factors are at play.

Proposal 10–7 The new Act should provide a safe harbour scheme to protect internet intermediaries from liability for serious invasions of privacy committed by third party users of their service.

Question 10–3 What conditions should internet intermediaries be required to meet in order to rely on this safe harbour scheme?

Broad safe harbour schemes will not be effective in curtailing serious invasions of privacy. The Australian Government, through the creation of the tort, criminal law sanctions and regulatory frameworks must step in to create a reasonable balance between freedom of expression and freedom from serious invasions of privacy, especially the publication of intimate material without consent. If a safe

harbour scheme is established, there must be an exception in relation to the publication of intimate or sexually explicit material without the verified and explicit consent of the subject to publish the content.

We understand this may well mean the sites that currently rely on this type of material as their main content will then find it uneconomic to operate. We say this concern is outweighed by the right to privacy. There is no intrinsic public interest in the publication of the material, it is otherwise carefully regulated (i.e. books, films). Our governments need to act quickly to ensure the same standards and protections are applied to material published online so as to protect its citizens, in particular women and victims of domestic violence.

At paragraph 10.78, the Commission requests stakeholder views on what conditions should be imposed on internet intermediaries. Notwithstanding our reservations in relation to safe harbours, we propose the conditions along the following lines:

- require users who upload sexually explicit material, to also upload the consent or permission of the subject to publish the content in such a way.
- require users to agree to terms and conditions or make certain declarations prior to uploading content, for example, "I own the copyright in this image and have permission to upload this image to this site," and "I declare that uploading this image is not a serious invasion of the subject's privacy."
- block users who contravene these terms and conditions from uploading future content.

While conditions such as these could provide some protections, in reality women will still be at real risk of serious invasions of privacy and the onus will be on the woman to show she did not consent and then to seek removal of the offending material. In relation to intimate material, it is far preferable that the harm is prevented, rather than that the victim may later seek redress in respect of harm caused.

Proposal 11–1 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.

YES. This proposal is strongly supported.

Proposal 11–2 The new Act should set out the following non-exhaustive list of factors that may mitigate damages for serious invasion of privacy:

- (a) that the defendant has made an appropriate apology to the plaintiff about the conduct that invaded the plaintiff's privacy;
- (b) that the defendant has published a correction of any untrue information disclosed about the plaintiff;
- (c) that the defendant has made an offer of amends in relation to the defendant's conduct or the harm suffered by the plaintiff;
- (d) that the plaintiff has already recovered compensation, or has agreed to receive compensation in relation to the conduct of the defendant;
- (e) that the defendant had taken reasonable steps to settle the dispute with the plaintiff in order to avoid the need for litigation; and
- (f) that the plaintiff had not taken reasonable steps to settle the dispute, prior to commencing or continuing proceedings, with the defendant in order to avoid the need for litigation.

YES, but with some reservations:

At (a), (b), (c) a relevant consideration for the court should be that the plaintiff accepts that the acts have mitigated the harm caused from the perspective of the plaintiff. Given that the tort is actionable *per se* and that the harm is in the breach itself, apology or correction will not necessarily provide any comfort to the plaintiff.

At (e) and (f) attempts at settlement may be contraindicated where there is past or present domestic violence.

Proposal 11–9 The new Act should provide that courts may award an injunction, in an action for serious invasion of privacy.

YES, this proposal is strongly supported.

Proposal 11–10 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.

YES, this proposal is strongly supported.

Proposal 11–13 The new Act should provide that courts may make a declaration, in an action for serious invasion of privacy.

YES.

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.

YES, this proposal is strongly supported.

Proposal 12–2 Relevant court acts should be amended to provide that, when considering whether to grant injunctive relief before trial to restrain publication of private (rather than confidential) information, a court must have particular regard to freedom of expression and any other countervailing public interest in the publication of the material.

YES.

Proposal 13–1 Surveillance device laws and workplace surveillance laws should be made uniform throughout Australia.

Proposal 13–2 Surveillance device laws should include a technology neutral definition of ‘surveillance device’.

Proposal 13–3 Offences in surveillance device laws should include an offence proscribing the surveillance or recording of private conversations or activities without the consent of the participants. This offence should apply regardless of whether the person carrying out the surveillance is a participant to the conversation or activity, and regardless of whether the monitoring or recording takes place on private property.

Proposal 13–4 Defences in surveillance device laws should include a defence of responsible journalism, for surveillance in some limited circumstances by journalists investigating matters of public concern and importance, such as corruption.

Question 13–1 Should the states and territories enact uniform surveillance laws or should the Commonwealth legislate to cover the field?

Proposal 13–5 Surveillance device laws should provide that a court may make orders to compensate or otherwise provide remedial relief to a victim of unlawful surveillance.

Question 13–2 Should local councils be empowered to regulate the installation and use of surveillance devices by private individuals?

We do not have the expertise to make informed comment on these proposals.

Briefly, the proposal for uniformity in surveillance device laws is supported.

Any measures in relation to surveillance devices which will hold perpetrators of domestic violence accountable for misuse of these devices in a domestic violence context and provide victims with a means of redress are supported, provided that victims may make private recordings of threats or abuse by a perpetrator without attracting civil or criminal penalties.

Proposal 14–1 A Commonwealth harassment Act should be enacted to consolidate and clarify existing criminal offences for harassment and, if a new tort for serious invasion of privacy is not enacted, provide for a new statutory tort of harassment. Alternatively, the states and territories should adopt uniform harassment legislation

The proposal for a Commonwealth Harassment Act, including a statutory tort, is strongly supported. Even with a separate Act creating a new tort, unification and strengthening of harassment laws to account for serious invasion of privacy, and for related offending such as unwanted contact, stalking, tracking, surveillance, and use of spyware is critical to combating the rising incidence of domestic violence in these contexts.

We support the creation and introduction of a Commonwealth Act as a matter of urgency.

Proposal 15–1 The ACMA should be empowered, where there has been a privacy complaint under a broadcasting code of practice and where the ACMA determines that a broadcaster’s act or conduct is a serious invasion of the complainant’s privacy, to make a declaration that the complainant is entitled to a specified amount of compensation. The ACMA should, in making such a determination, have regard to freedom of expression and the public interest.

YES. The proposal is strongly supported. This mechanism may be far less stressful and easier to access for those who face barriers such as domestic violence, language and culture.

Question 15–2 Should 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;

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- (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?

YES, the introduction of regulator take-down orders is strongly supported, as a cheaper and quicker alternative to seeking injunctions through the courts.

Proposal 15–3 The Privacy Act 1988 (Cth) should be amended to confer the following additional functions on the Australian Information Commissioner in relation to court proceedings relating to interferences with the privacy of an individual:

- (a) assisting the court as amicus curiae, where the Commissioner considers it appropriate, and with the leave of the court; and
- (b) intervening in court proceedings, where the Commissioner considers it appropriate, and with the leave of the court.

YES, this proposal is supported.