

11 November 2013

Australian Law Reform Commission

**A statutory cause of action for serious invasions of privacy – submission by the Women’s Legal Centre (ACT & Region) Inc**

The Women’s Legal Centre (ACT & Region) Inc. (“WLC”) is a Community Legal Centre accredited by the National Association of Community Legal Centres. The Centre has been providing services to women in the ACT and surrounding region since 1996. The main areas in which we provide advice are family law, domestic violence, employment and discrimination law and victims of crime compensation. Our client group includes disadvantaged women, those from culturally and linguistically diverse communities, Aboriginal and Torres Strait Islander women, women with disabilities, and women living in poverty. In the 2012-2013 year, 13% of our clients did not speak English well or required an interpreter; 17% of our clients were homeless or at risk of homelessness; 44% of our clients were experiencing or had experienced domestic of family violence.

The WLC is pleased to provide this submission to the Australian Law Reform Commission’s inquiry into ways in which the law might prevent and redress serious invasions of privacy.

The WLC runs a telephone advice line for women in the ACT and Region. The main areas of law where we provide legal advice for women are family law, domestic violence, employment law, discrimination and victims of crimes work. We provide information and referral about other areas of law.

In our submission we are intending to address a narrow band of examples that affect our clients. Our client’s experiences include:

1. Photographs, images and/or film of an intimate nature, taken with consent of both parties, during an intimate relationship. At the end of the relationship the other party threatens to:

* distribute the photographs to other people
* put the photographs on Facebook
* disclose film to a family member

1. Intimate images taken by our client and sent or given to the other party during the relationship. Once again, at the end of the relationship the other party refuses to return or destroy the images and threatens to

* distribute the photographs to other people
* put the photographs on Facebook
* discredit our client in some way with the images

1. Photographs of our client’s children are distributed digitally without our client’s consent by the other parent or by members of the other parent’s family.
2. Our client may be in a new relationship and her former partner has illegally accessed her computer with images private to herself and her new partner.
3. Spyware has been installed on our client’s computer and all her information is being accessed by her former partner.

By way of example, there is a family law case where the husband asked the then 13 year old son to load an ‘agent’ (spyware ?) on to the computer in his mother’s house: see paragraph 20.  There appears to be no consequence to the father although the impact on the child is discussed at paragraph 153.  It would appear the police took no action: Cloake & Cloake [2012] FMCAfam 1113 <http://www.austlii.edu.au/au/cases/cth/FMCAfam/2012/1113.html>

1. “Discussions” by third parties on social media sites about our client’s personal information, for example, about the breakdown of her relationship.
2. The WLC does not have client examples of spyware programs on mobile telephones but is aware that this is a problem identified by services working with women who are experiencing domestic and family violence. Spyware programs can collect the following information and possibly more: contact data, MMS, SMS, phone call history, email history, web page history, pictures, video, GPS location, cell tower triangulation history (less accurate), file system information. Some spyware programs can remotely become a covert third party to conversations as well as use the phone as a bug so that room audio is available whenever the spy chooses. Other spyware can alert the spy when a call is made as well as texts and emails so they can call the phone and listen in.

We are concerned about this behaviour in the context of a history of domestic and family violence. Holding such images and/or threatening to make images or information public can be closely connected to the cycles of coercion and control that exist within these relationships. It is important that the women have an avenue of redress which is practically accessible. In our view a private cause of action should sit alongside criminal options for prosecution in situations where there is stalking, harassment and other criminal conduct such as threats to safety.

At present there is very little action that a client in such circumstances may take in the Australian Capital Territory, other than referring the matter to the police for investigation. The conduct may form the grounds for a Domestic Violence Order or Personal Protection Order and prohibit future conduct that would be regarded as harassing or offensive to the woman. However these Orders would not operate to compel the other party to return or remove the offending material.

With the possible exception of (3), we submit that there is an invasion of our client’s privacy. We say that all of these activities are private and could form part of a non-exclusive list of examples of invasion of privacy. We submit that there exists a reasonable expectation of privacy in all of these circumstances; and that this should be the threshold test for actionability of a serious invasion of privacy. There is no competing public interest in these examples.

In relation to a person’s children the matter is more complex. The photographs may have been made available by the other parent who is arguably able to give consent to the distribution of the images. There are issues about the child’s right to privacy and in what circumstances that may be invaded.

From the context of our client’s concerns we agree with the proposition that a statutory cause of action should be actionable without proof of damage. In these instances the invasions of privacy are likely to be non-financial in consequence and may not meet a test of provable damage. We support the court being able to consider a wide range of remedies including apology and delivery up, destruction and/or removal of the offending material. Should damage remain a prerequisite for action, we support the inclusion of suffering of humiliation or emotional distress within the definition of damage for the purpose of a cause of action. The WLC supports the awarding of exemplary damages as a way of displaying disapproval of invasion of privacy.

From a practical point of view, commencing private court proceedings to pursue and action against an invasion of privacy, is unlikely to be pursued by many clients. They will be dissuaded by cost and complexity. One would assume that Legal Aid will not be available for such an action. For this reason, we support the proposal that an independent regulator, such as the Australian Privacy Commissioner be enabled to bring proceedings on behalf of a person who has experienced an invasion of privacy.

Finally, in relation to proposals to use alternative dispute resolution to resolved complaints about invasions of privacy, it is important to remember that many women who experience invasions of privacy are victims of domestic and/or family violence and the examples of acts complained of in our submission take place in a private sphere. Proper screening for risk would need to be taken prior to such alternative dispute resolution taking place to determine its appropriateness in circumstances where there may be a power imbalance between the parties.

Thank you for the opportunity to make a submission. If there are any matters arising, please do not hesitate to contact the undersigned.

Yours faithfully,

WOMEN’S LEGAL CENTRE



Rhonda Payget

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