



SUBMISSION

Serious Invasions of Privacy in the Digital Era

Prepared by Women's Legal Service Victoria
and Domestic Violence Resource Centre Victoria for the
Australian Law Reform Commission

Endorsed by

Women's Legal Services Australia

INTRODUCTION

Thank you for the opportunity to provide a submission in response to the Australian Law Reform Commission's (ALRC's) issues paper on serious invasions of privacy.

This submission is made jointly by Women's Legal Service Victoria (WLSV) and Domestic Violence Resource Centre Victoria (DVRCV). The submission is endorsed by the national network, Women's Legal Services Australia (WLSA).

Purpose of our submission

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

The purpose of our submission is to:

- a. inform the ALRC on the nature of serious invasions of privacy that occur in a domestic violence and stalking context
- b. highlight the important aspects, in developing a cause of action, that will be relevant to victims of domestic violence and
- c. recommend ways in which the cause of action may be accessed by the most disadvantaged and vulnerable in our community.

Context

WLSV represents women who are victims of domestic violence and stalking. Disturbingly, we are seeing increasing numbers of women who are subject to the most significant invasions of privacy, by current and former intimate partners, family members and other men who may be known or are unknown to their victim.

These invasions of privacy are increasingly occurring in a public domain. Technology has facilitated invasions of privacy that would have been unimaginable ten years ago.

During 2013, DVRCV conducted research to examine the emerging issue of technology-facilitated stalking in the context of domestic violence. DVRCV's Smart Safe project identified a wide variety of technology used to breach victim's privacy including text messaging, social media, GPS, and photo and video technologies.¹

The Smart Safe project involved interviews and two surveys, one conducted with 152 workers in the domestic violence sector and 46 victims in Victoria. 97% of workers surveyed stated that perpetrators were using mobile technologies to monitor, abuse and harass women in the context of domestic violence.²

¹ SmartSafe research findings report, Domestic Violence Resource Centre Victoria, DVRCV 2013 www.smartsafe.org.au

² See n1

At a broader policy level, we consider serious invasions of privacy to be a form of violence against women. Violence against women is a fundamental violation of the human rights of women. It is a form of discrimination that seriously inhibits women's ability to enjoy a range of rights and freedoms on the same basis as men.³

ABOUT US

Women's Legal Service Victoria

WLSV, established in 1981, is a specialist, state-wide community legal centre working with disadvantaged and vulnerable women experiencing domestic violence and relationship breakdown.

We provide legal advice and representation, build capacity through legal education and highlight systemic issues in law and policy.

Our principal areas of work are family law, domestic violence intervention orders and victims of crime compensation.

Domestic Violence Resource Centre Victoria

DVRCV, established in 1987, is a state-wide resource centre that aims to prevent family violence and promote respectful relationships.

DVRCV provides:

- training courses for professionals on responses to family violence;
- initial support, information and referral for those affected by family violence;
- a specialist resource library;
- a range of publications including booklets, research and discussion papers;
- advocacy on policy initiatives, law reform and best practice frameworks; and
- a coordinated network for professionals involved in the primary prevention of violence

Women's Legal Services Australia

WLSA is a national network of community legal centres specialising in women's legal issues.

Members of WLSA regularly provide advice, information, casework and legal education to women and service providers on a range of topics including family law, child protection, domestic violence personal protection orders, reproductive health rights and discrimination matters.

³ United Nations CEDAW General Recommendation No. 19 (11th session, 1992)

PRINCIPLES GUIDING REFORM

We strongly support privacy as a value and privacy as a matter of public interest.

Flexibility and adaptability

We support principles of flexibility and adaptability in the design of a statutory cause of action.

Conduct that may be considered a serious breach of privacy is presently inadequately addressed in the Victorian *Crimes Act 1958*⁴. A lack of policing in matters of domestic violence where the perpetrator utilizes technology to invade the victim's privacy can be seen to be, in part, the result of rapidly changing technologies and resultant changing types of abuse.

Current criminal and civil protections are not easily adapted, so as to be applied consistently to evolving technologies.

Access to justice

Access to justice is fundamental to the rule of law. It is also essential for the enjoyment of basic human rights, social inclusion and the effective functioning of any democracy.

A good justice system must be accessible in all aspects. Accessibility means it must be fair, simple, affordable and easy to understand and navigate. It must also have pathways for early intervention to prevent further disadvantage.

Women who experience domestic violence are particularly disadvantaged in accessing the civil justice system. Alongside disadvantage that arises due to their gender and their experience of domestic violence, women are likely to face disadvantage in accessing the justice system due to their:

- economic status (low income earners)
- social status
- levels of education and literacy
- mental or physical disability
- inter-generational trauma
- cultural, ethnic or religious background
- migration status and
- residential location (particularly for a person in rural, regional and remote areas).

We support the development of a cause of action which ensures the availability of remedies for women experiencing disadvantage. A cause of action must adequately anticipate and respond to any gender bias in the ability of disadvantaged women to participate effectively in the justice system.

⁴ Section 21A

Equality

Though not mentioned in the issues paper, equality must be a guiding principle for reform.

Our submission makes an important connection between serious invasions of privacy and violence against women (and more specifically, domestic violence).

In international law, violence against women is recognised as a form of discrimination and a barrier to women being able to realize their right to housing, health and economic security in the way that men do. Two thirds of people in Victoria seeking homelessness support are women principally because of domestic violence⁵. Domestic violence is also the highest preventable cause of death, disability and illness for women aged 15-44 years⁶.

The international Convention on the Elimination of Discrimination Against Women (CEDAW) General Recommendation No. 19 sets out State parties' obligations in relation to gender based violence as follows:

(t) States parties should take all legal and other measures that are necessary to provide effective protection of women against gender-based violence, including, inter alia:

(i) Effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence, including inter alia violence and abuse in the family, sexual assault and sexual harassment in the workplace;

Using equality as a guiding principle will be helpful for the ALRC in the design and practicalities of the implementation of the cause of action - such as location and forum. For example how does location and forum disproportionately impact on women who are victims of violence? How can the legislation ensure equality in access to justice?

Providing injunctions or other interim measures are necessary components to enable women to effectively seek remedies for serious breaches of their privacy. Safeguards such as measures to protect confidentiality and rights where there is a risk of further violation of privacy or adverse consequences for plaintiffs are crucial in ensuring women have access to justice.

As a recognised human right, privacy protection generally should take precedence over a range of other countervailing interests, such as cost and convenience⁷.

THE IMPACT OF A STATUTORY CAUSE OF ACTION

It is important that a statutory cause of action captures activities that occur in the context of domestic violence.

⁵ Australian Institute of Health and Welfare (AIHW), Homeless People in Supported Accommodation Assistance Program (SAAP), SAAP National Data Collection Annual Report 2006-07, p 16

⁶ Victorian Health Promotion Foundation, Victoria Department of Human Services (2004) *The health costs of violence. Measuring the burden of disease caused by Intimate Partner Violence: A Summary of Findings.*

⁷ Australian Privacy Law and Practice (ALRC Report 108)

The types of behaviour a statutory cause of action should prevent or redress include:

- Tracking women's locations with GPS - either through the use of smart phone applications such as "find my friends" or through the placement of tracking devices.
- Use of video or other digital technologies to stalk or to receive private information.
- Monitoring or hacking of social media accounts, email accounts, online dating accounts.
- Use of a woman's private information (such as phone number and address) posted, without her consent, on online chat rooms, blogs and websites.
- Use of private information received to publicly humiliate women or to control them through threats of publication.
- Private photos, videos and information shared in public forums, such as Facebook and YouTube.
- The setting up of surveillance cameras in the home, and in other locations to monitor women's activities.

The recent DVRCV research found that perpetrators of domestic violence are increasingly using mobile technologies to abuse, stalk and harass women. This harassment is done more easily, instantaneously and from a distance but has the same detrimental psychological impact.⁸

Technology is used to humiliate and publically shame women, often in sexualised ways. Women are reluctant to seek help, often feel embarrassed about their experiences and fear they will not be believed. When women do seek legal help by taking out an intervention order, it is not always effective in stopping perpetrators from abusing, stalking and harassing women via mobile technologies⁹.

Case studies

The Smart Safe research documented examples of behaviour that would be considered significant invasions of privacy:

"A past client was under a great array of electronic surveillance. Her partner had installed a tracking device in her car and would text her and let her know that he was aware of her location. She had the GPS disabled on her phone, but this persisted. Also, after engaging a person to repair the front gate, it was discovered that her ex-partner had installed covert cameras both in the home and at the front gate that he had linked to his computer." - Domestic violence sector worker.

⁸ See n1

⁹ See n1

"A woman had her ex-partner saturate her [facebook] page with information about how he gave her an STI [sexually transmissible infection] – this information was read by her teenage son's friends." - Domestic violence sector worker.

"Video of a victim doing a seductive dance shown to her children by her ex and used to degrade her to them, threats were also sent via Facebook. Most of these are done in breach of intervention order." - Domestic violence sector worker.

"I suspect he may have installed software onto my iPhone enabling him to have access to my phone calls, text messages, Facebook, emails, etc. He sometimes says things or behaves in ways that suggests he knows something via a suspicious means." – Victim/survivor

We have provided the Commission with the cases of two clients that WLSV has legally assisted. The cases illustrate the types of activities that the law does not already adequately prevent or redress and that should be covered by the cause of action.

The cases are provided as a confidential addendum to the submission and we ask that they not be publicly disclosed.

INVASION OF PRIVACY

We support a non-exhaustive list of examples being included in legislation to guide decision makers and individuals. We suggest the list include:

- unauthorised surveillance and tracking via the use of technology
- hacking of email, twitter, face book or other online accounts
- the public disclosure of private information without consent
- interference with, misuse or disclosure of private written, oral or electronic communication
- misuse of private information, including photographs or images of an individual created for a private use (or without their consent).

If the misuse of private information is not included as an example of a serious invasion of privacy, we would support a separate cause of action for misuse of personal information. However our preference is for a single cause of action which is broad and adaptive.

PRIVACY AND THE THRESHOLD OF SERIOUSNESS

Reasonable expectation of privacy

We consider it important that in formulating the test, that some of the unintended consequences be recognised and addressed in the legislation.

Unintended consequences

In the context of domestic violence there may be the unintended consequence that a decision maker finds that a woman in a relationship has 'waived' any reasonable expectation of privacy.

For example, this may occur if a woman has consented to her photograph being taken by her partner and used for one purpose only. Her partner then posts her photo on an escort agency website. Or she has disclosed her password to her partner who then, after the relationship ends, changes the password in order to control her facebook page.

If the test of 'reasonable expectation of privacy' is used, it must be made clear that a person can only waive the right if he or she consented to the use of the information or image for a specific purpose.

It may also be helpful to provide examples of conduct where there will be an expectation of privacy and ensure that it includes examples of acts committed in the context of domestic violence.

Threshold of seriousness

In order to ensure that the cause of action is accessible to the broader community, particularly disadvantaged individuals, we believe it is important that the cause of action be as simple as possible to understand and prove. Multiple and complex elements can result in an action that is too difficult for victims of domestic violence to use and prove.

We therefore support a single limb test, "that a person is reasonably entitled to expect privacy".

In the alternative, should an additional test be included, it is important that the test is related to "distress" and harm" rather than "offensiveness".

In some instances a person's ethnic, cultural and religious background will inform whether the inappropriate use of private information and images are distressing and harmful.

An element of subjectiveness, if such a test is used, is important given the diverse range of experiences and backgrounds in the community.

DAMAGES

It is important that the cause of action for invasions of privacy be actionable without proof of damage. As noted in the issues paper, a cause of action that does not require proof of damage recognises a broader range of consequences for an individual that are not financial. In the context of domestic violence, this is particularly important.

The consequences of serious invasions of privacy can be significant in terms of reputation and emotional trauma. The examples that we have provided illustrate how serious invasions of

privacy in domestic violence can cause severe humiliation, distress and insult. Though the impact on a woman's life can be profound, it may not result in any direct financial loss. \

DEFENCES AND EXEMPTIONS

We support the inclusion of defences where the invasion is:

- authorised or required by law or
- in the public interest.

Consent as a defence

We do not support the inclusion of consent as a defence.

As highlighted above, consent may pose difficulties in the context of pre-existing relationships, where the defendant is known to the plaintiff.

Consideration should be given to how such a defence would disproportionately impact women who are victims of domestic violence in accessing the cause of action.

Women in domestic violence situations may well have consented to the use of an image or access to personal information by their partner, however it is not uncommon for the image or personal information to then be used for different purposes.

Additionally, in domestic violence situations, the relationship is characterised by dominance and control. A victim may not have provided her consent freely. Instead consent may be provided because she is fearful of her partner or fearful of the consequences of not consenting. It is not uncommon for there to be a significant degree of threatening and coercive behaviour which may result in a victim being pressured to consent.

If consent were to be included as a defence, the legislation should be very clear that consent must be genuine (free from duress), informed, proportionate and specific to a purpose that is known and understood by the plaintiff.

Careful consideration should be given to how consent would be assessed (objectively or subjectively) and how it could be applied to negate the intentions of the cause of action.

MONETARY & OTHER REMEDIES

Damages

We support the availability of exemplary damages given that serious invasions of privacy in the domestic violence context are often characterised by malice and would constitute egregious conduct.

It is also important that damages recognise the degree of emotional distress and humiliation and the ways in which this can impact on a woman's life.

Other remedies

Many of the cases that WLSV sees with respect to serious invasions of privacy involve websites where images and information are inappropriately posted.

It is important that an order for the removal of material be available. We consider it important that such orders also bind third parties.

For instance, where inappropriate material is posted on a website, the website manager or internet host should be included in an order for the removal of the material. Binding only the defendant will prove to be ineffective in some cases.

WHO MAY BRING A CAUSE OF ACTION

Our submission has highlighted the importance of ensuring the cause of action is accessible to most disadvantaged in our community. It is important to recognise that for some people who experience disadvantage, bringing a cause of action as an individual will be impossible.

It is therefore important that an independent power be given to the Privacy Commissioner to bring an action on behalf of an individual. It would also be appropriate for the Privacy Commissioner to have a power to bring an action by their own motion.

LOCATION AND FORUM

Forum

We strongly recommend that the forum for bringing a cause of action be a tribunal such as the Administrative Appeals Tribunal (AAT).

As noted in the issues paper, filing fees and costs of legal representation are likely to be lower in a tribunal setting. Adverse costs orders are also less likely to be awarded in these jurisdictions, thereby removing one of the barriers to accessing justice.

Alternative Dispute Resolution

We do not consider ADR to be appropriate for cases where there has been domestic violence.

ADR should not be compulsory or otherwise an exception should exist where domestic violence has occurred. Guidance in relation to the suitability of parties for ADR can be found in the family law jurisdiction, where there are exceptions to compulsory mediation if there are allegations of domestic violence.

OTHER LEGAL REMEDIES TO PREVENT AND REDRESS SERIOUS INVASIONS OF PRIVACY

If a stand-alone statutory cause of action for serious invasions of privacy is not enacted, WLSV and DVRCV support existing law being supplemented by legislation to:

- provide a cause of action for harassment
- enable courts to award compensation for mental or emotional distress in actions for breach of confidence and
- provide for a cause of action for intrusion into the personal activities or private affairs of an individual.

In regards to compensation for distress where there has been a breach of confidence this would increase the ability for women experiencing a breach of privacy as a form of domestic violence to access remedies and relief for behaviour which is currently inadequately covered by the law.

CONCLUSION

We wish you well in finalising your review.

If you would like to discuss our submission or would like further information, please contact Pasanna Mutha-Merrennege, WLSV Policy & Campaigns Manager on (03) 9642 0877.