



## RESPONSE TO DISCUSSION PAPER

### Serious Invasions of Privacy in the Digital Era

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

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## **INTRODUCTION**

We thank the Australian Law Reform Commission for the opportunity to respond to its discussion paper.

The Women's Legal Service Victoria (WLSV) and Domestic Violence Resource Centre Victoria (DVRCV) made a submission to the ALRC's Issues Paper identifying serious invasions of privacy that occur in a domestic violence and stalking context. We also recommended ways in which a tort could be developed to be accessible to the most disadvantaged and vulnerable in our community.

### **Purpose of our submission**

We welcome the ALRC's recommendation to introduce a new tort for serious invasions of privacy.

Our submission, in response to the discussion paper, gives practical consideration to how such a tort may be effectively used by victims of domestic violence or stranger stalking and to recommend changes which create an accessible, usable cause of action.

## **ABOUT US**

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### **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 domestic violence and promote respectful relationships.

DVRCV provides:

- training courses for professionals on responses to domestic violence;
- initial support, information and referral for those affected by domestic 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

## **EMERGING THREATS TO PRIVACY**

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It is important, in developing a new tort, to recognise the new and emerging threats to privacy in the digital era. New technologies enable perpetrators to invade a victim's privacy in ways not previously possible. These serious invasions of privacy are multi-dimensional and complex. We would caution against a simplistic description of such acts as being "revenge porn" or a similar categorisation.

A key finding in the SmartSafe research conducted by DVRCV has been the use of GPS to monitor victim's movements.

Perpetrators download mobile applications to victim's phones or hide GPS devices in their vehicles. A domestic violence worker who was a participant in the SmartSafe research illustrated the numerous ways in which perpetrators can use GPS:

"A past client was under a great array of electronic surveillance. Her ex-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."

The following example from the SmartSafe research clearly illustrates the possibilities that mobile technologies offer perpetrators. A domestic violence worker wrote:

"My client fled from another country to Australia due to domestic violence, but her ex-partner located her through Facebook and began sending threatening messages to her in Australia. He migrated to Australia to continue harassing, stalking and abusing her. He gained access to her mobile phone in order to monitor her contact with services, friends, etc."

The global reach of technology can enable a perpetrator enormous scope, and many opportunities, to invade a victim's privacy. The example shows the effect on the victim's life was multi-faceted; not only could she not escape him (he was able to track her internationally) but he was also able to control and isolate her, monitoring her contacts and abusing her friends and family.

## **GUIDING PRINCIPLES**

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As noted in our original submission we support the guiding principles of:

- access to justice
- flexibility and adaptability and
- equality.

We would not support a principle of mutuality being included in the legislation. Mutuality suggests that both parties (the plaintiff and respondent) to a proceeding are on an equal footing and are equally able to take steps to protect their privacy or to act to prevent breaches.

In a relationship characterised by domestic violence, there is a significant power imbalance where one party controls and dominates the other. Similarly, where a person experiences disadvantage, such as a learning disability or difficulty with reading or writing English, they may not be able to take the steps necessary to protect their privacy. We do not consider the principle of mutuality to be appropriate in these circumstances.

## **A CAUSE OF ACTION FOR TWO TYPES OF INVASION OF PRIVACY**

We support the two broad categories of invasion of privacy in Proposal 5-1 of the discussion paper. Intrusion upon a plaintiff's "seclusion or private affairs" is particularly important in light of the use of tracking devices and surveillance in domestic violence and stalking situations. "Misuse or disclosure of private information" will be useful in cases where a perpetrator has publicly disclosed a victim's details or photographs online.

Unfortunately both the terms "seclusion" and "private affairs" are not easily understood to a member of the public. It is important that a non-exhaustive list of types of invasion of privacy be included as guidance.

The examples provided at 5.47 of the paper could be simpler and more clearly expressed. For example, "interference with an individual's home or family life" could mean a range of activities that may not necessarily be a breach of privacy.

We recommend more specific and plain English examples be included as part of the list such as:

- a person's online accounts such as their email account or social media account has been accessed, interfered with or misused
- a person's private information, including photographs or personal details, have been accessed or disclosed
- an individual's private email correspondence or telephone calls have been monitored or recorded or
- an individual's movements and locations have been monitored and tracked, for example via mobile technology.

It is important that wherever possible in the new Act, digital technology and online conduct be used as examples to inform the interpretation of the tort.

## **A REASONABLE EXPECTATION OF PRIVACY**

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We reiterate our concerns made in our original submission that the test of a reasonable expectation of privacy will be a barrier for victims who wish to pursue an action against a person they were previously in an intimate relationship with.

Where a breach of privacy has occurred during an intimate relationship we are concerned that this test will make it more difficult for a victim to prove that she or he had a reasonable expectation of privacy.

In the alternative, if the tort includes the test, we support the inclusion of a list of considerations as referred to in Proposal 6-2. We make the following recommendations in relation to the list:

- Inclusion of an additional consideration of:

*“the nature and characteristics of the relationship (if any) between the plaintiff and the respondent”*

It is important to recognise the difficult circumstances for a victim living in an abusive relationship and how this may inform their decision making regarding the sharing of information. This consideration provides a basis for the victim to provide evidence of controlling behaviour, ongoing physical abuse and threats to harm that may have characterised the relationship.

- Paragraph (f) considers the extent of the information that is already in the public domain. We would suggest an additional consideration as to *why* the private information was already in the public domain. This provides a much needed context to this consideration – for example, a photo posted by the plaintiff on facebook may have been posted with the intention of sharing it with friends.
- Paragraph (g) refers to the relevant attributes of the plaintiff. We suggest this be expanded to recognise specific disadvantage as follows:

*“the relevant attributes of the plaintiff including their age, disability, culture, ethnicity occupation, language and literacy skills”.*

A broader list of examples would be useful in recognition of the diversity of the experience of plaintiffs.

## **FORUMS, LIMITATIONS AND OTHER MATTERS**

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### **Forum**

In response to Question 9-1 we support the tort being actionable in local tribunals. For example, in Victoria, matters could be brought in the Victorian and Civil Administrative tribunal which is a

low cost jurisdiction. This ensures the tort is accessible to the most disadvantaged in our community.

We would also suggest that the tort be available in the local state court where intervention orders are determined.

For example, in Victoria, the Magistrates' Court of Victoria hears and determines domestic violence intervention orders. It would be useful for a victim to be able to make an application both for an intervention order as well as an order injuncting a perpetrator from continuing to breach her or his privacy at the same time.

### **Limitation period**

With respect to the limitation period in Proposal 9-4 it is recommended that the limitation period be for three years from the date on which the plaintiff became aware of the invasion of privacy or six years from the date on which the invasion of privacy occurred. This recommendation is based on the six year limitation period for general tortious claims in Victoria under the *Limitation of Actions Act 1958* (Vic) s 5(1)(a).

If the invasion of privacy occurred when the victim was a child, we would suggest the time limit begin from when the victim turns 18 years.

A longer limitation period is important for victims of domestic violence particularly a child victim. A victim may take a significantly longer period of time to flee a violent relationship, rebuild their lives and pursue an action against a perpetrator. The current proposal does not take into account the barriers of disadvantage and trauma that may make it difficult for a person to pursue a tort within such a short time frame.

## **REMEDIES AND COSTS**

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We support Proposal 11-1 providing that courts may award compensatory damages, including damages for the plaintiff's emotional distress.

We support the power of a court to order the delivery up and destruction or removal of material. In particular it is important that power extend to orders to take down online content. It is essential that this order bind third parties such as internet providers and organisations that run social media websites.

### **Costs**

We believe that there are good public policy reasons to provide that costs should only be awarded in exceptional circumstances, where the case is determined to be an abuse of process or vexatious.

## **CONCLUSION**

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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 Manager on (03) 9642 0877.