



28 November 2013

The Executive Director
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001

By email: privacy@alrc.gov.au

Dear Executive Director,

Serious Invasions of Privacy in the Digital Era

About Women's Legal Services NSW

1. Women's Legal Services NSW (WLS NSW) thanks the Australian Law Reform Commission for the opportunity to comment on *Serious Invasions of Privacy in the Digital Era Issues 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.

Summary of recommendations

3. In summary, we recommend:
 - a. Recognition of the many forms of abuse of technology discussed in this submission as forms of violence against women;
 - b. As proposed by Women's Legal Services Victoria and Domestic Violence Resource Centre Victoria a statutory cause of action to prevent or redress: 'tracking women's location with GPS; use of video or other digital technologies to stalk or receive private information; monitoring or hacking of social media accounts, email accounts, online dating accounts; use of woman's private information ... posted without her consent, [for example], 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; the setting up of video cameras in the



home, and in other locations to monitor women's activities';

- c. In light of abuse of technology as a form of violence against women, consideration being given to the extension of grounds for apprehended violence orders and new criminal sanctions;
- d. That the principles guiding this privacy reform also include the right to equality and the right to security of person;
- e. Concerns regarding the sharing of information without informed consent in the context of the NSW Domestic and Family Violence Reforms must be adequately addressed, including the development of information sharing protocols with input from those working in the domestic violence and sexual assault sectors;
- f. A cause of action being available for negligent invasions of privacy as well as intentional or reckless invasions of privacy;
- g. In any defence to a statutory cause of action that the conduct was authorised or required by law or incidental to the exercise of a lawful right of defence of persons or property, there should be a requirement that the act or conduct was proportionate, or necessary and reasonable;
- h. An independent body, such as the Australian Privacy Commissioner, should be able to bring proceedings on behalf of an individual or individuals;
- i. Referrals to mediation or conciliation are only made after an assessment that such a referral is appropriate;
- j. Matters involving serious and ongoing 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;
- k. Matters relating to sexual harassment or other forms of sexual violence are not referred to mediation or conciliation.

Serious Invasions of privacy – a form of violence against women

4. 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 advice line 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. Current Australian laws dealing with such behaviour are unclear, inadequate and potentially ineffective as the sanctions may be disproportionate to the distress caused by having the matter heard in court and thus people knowing what some people may prefer kept as private business.
6. Laws must be developed to adequately respond to the misuse and abuse of new and emerging forms of technology.
7. We have also read the submission by Women's Legal Services Victoria and Domestic Violence Resource Centre Victoria and endorse their submission.

'Non-consensual pornography'

8. Mary Anne Franks, an Associate Professor of Law at the University of Miami School of Law has recently written *Combating Non-Consensual Pornography: A Working Paper* which explores how the United States has responded to this issue.
9. Franks defines non-consensual pornography as 'the distribution of sexually graphic images of individuals without their consent'.¹ An aspect of this is 'revenge porn', that is, where sexually explicit images originally obtained with consent are distributed without consent.²
10. Franks argues non-consensual pornography is 'on the rise in part because there is little incentive for malicious actors to refrain from such behavior'.³ She also argues that while non-consensual pornography may constitute a violation of the right to privacy 'it is also an act of sexual use without consent'⁴ and 'a form of sexual abuse'⁵ which should be criminalised.
11. Franks refers to the law in New Jersey which 'prohibits the non-consensual observation, recording, or disclosure of intimate images, recognizing that each of these actions constitutes a distinct harm'.⁶
12. However, she argues more can be done, including amending the definition of 'sexual act' in federal law to include 'the sexual use of actual visual representations of an individual's body without consent'.⁷
13. The issue of 'revenge porn has also been raised as an issue of concern in Australia'.⁸

A broader perspective

14. While non-consensual pornography is one form of violence against women and a key issue we focus on in this submission, Women's Legal Services Victoria and Domestic Violence Resource Centre Victoria outline many other serious forms of violence against women which must also be addressed. We share their recommendation for a 'statutory cause of action [to] prevent or redress: tracking women's location with GPS; use of video or other digital technologies to stalk or receive private information; monitoring or hacking of social media accounts, email accounts, online dating accounts; use of woman's private information ... posted without her consent, [for example], 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; the setting up of video cameras in the home, and in other locations to monitor women's activities'.

¹ Mary Anne Franks, *Combating Non-Consensual Pornography: A Working Paper*, September 2013 at 3 accessed on 7 November 2013 at: http://www.endrevengeporn.org/main_2013/wp-content/uploads/2013/10/Franks-NCP-Working-Paper-9.18.pdf

² Ibid.

³ Ibid at 7.

⁴ Ibid.

⁵ Ibid at 12.

⁶ Ibid at 9.

⁷ Ibid at 12.

⁸ Mark White, 'Revenge porn: caught in a web of spite', *smh*, 7 October 2013 accessed on 7 November 2013 at: <http://www.smh.com.au/digital-life/digital-life-news/revenge-porn-caught-in-a-web-of-spite-20131006-2v21q.html>

15. In addition to considering changes to privacy laws, consideration should also be given to the extension of grounds for apprehended violence orders (AVOs) and new criminal sanctions.

Balancing of competing human rights

Question 1: *What guiding principles would best inform the ALRC's approach to the Inquiry and, in particular, the design of a statutory cause of action for serious invasion of privacy? What values and interests should be balanced with the protection of privacy?*

16. We support the principles guiding reform as proposed in the Issues Paper and provide particular comment with regards to the balancing of privacy with other values and interests.

Violence against women

17. Violence against women is one of the most widespread human rights abuses. In Australia:

- domestic violence puts more women aged 15-44 years at risk of ill health and premature death than any other risk factor;⁹
- one in three Australian women will report being a victim of physical violence and almost one in five will report being a victim of sexual violence in their lifetime according to the Australian Bureau of Statistics.¹⁰ We also know that family violence and sexual assault are under reported.
- whatever the form violence takes, it has serious and often devastating consequences for victims, their extended families and the community.
- violence against women also comes at an enormous economic cost. Research released by the Government shows that each year violence against women costs the nation \$13.6 billion.¹¹ This figure is expected to rise to \$15.6 billion by 2021.

18. CEDAW Committee *General Comment No 19* makes clear that gender-based violence is a form of discrimination within Article 1 of *CEDAW*¹² and Article 2 of *CEDAW* obliges state parties to legislate to prohibit all discrimination against women. Such violence is a violation of the rights to life, to equality, to liberty and security of person, to the highest standard attainable of physical and mental health, to just and favourable conditions of work and not to be subjected to torture and other cruel, inhuman, or degrading treatment or punishment.¹³

19. The use of technology to shame, humiliate, intimidate and/or harass women is a form of gendered violence that must be urgently addressed.

20. Under international human rights, States are required to act with due diligence to protect, promote and fulfil their human rights obligations.¹⁴

⁹ VicHealth and Department of Human Services, *The Health Costs of Violence. Measuring the Burden of Disease Caused by Intimate Partner Violence – A Summary of Findings*, 2004 at 10.

¹⁰ Australian Bureau of Statistics (2005) *Personal Safety Survey*, ABS Cat. No. 4906.0, Canberra: Commonwealth of Australia. (ABS 2005).

¹¹ KPMG, *The Cost of Violence against Women and their Children. Safety Taskforce*, Department of Families, Housing, Community Services and Indigenous Affairs, Australian Government, 2009.

¹² CEDAW Committee, *General Recommendation No. 19: Violence against Women*, UN Doc A/47/38 (1992), para 7.

¹³ CEDAW Committee *General Comment No 19*, para 7. See also: *International Covenant on Civil and Political Rights (ICCPR)* ratified by Australia on 13 August 1980, Articles 2, 3, 7 and 26; *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, ratified by Australia on 10 December 1975, Articles 3 and 10.

¹⁴ Human Rights Committee, *General Comment No. 31, CCPR/C/74/CRP.4/Rev.6*, para. 8; Committee on the Rights of the Child, *General Comment No. 5, CRC/GC/2003/5*, 27 November 2003, para. 1; Committee on Economic, Social and Cultural Rights, *General Comment No. 14, E/C.12/2000/4* (2000), para. 33.

21. Significantly, States may be held responsible for private acts, such as domestic and family violence, if they fail to act with due diligence to prevent, investigate or punish acts of violence.¹⁵
22. Human rights are based on the inherent dignity of the person.
23. While there is a right to freedom of opinion and expression, the *International Covenant on Civil and Political Rights* also acknowledges that with rights come responsibilities, including 'respect of the rights or reputations of others'.¹⁶
24. The *International Covenant on Civil and Political Rights* (ICCPR) states that restrictions on the right to freedom of opinion and expression can only be limited to the extent 'provided by law and are necessary'.¹⁷ We submit that the sharing of intimate images with third parties without free and informed consent and the other concerns raised by Women's Legal Services Victoria and Domestic Violence Resource Centre Victoria discussed above, which are all forms of violence against women, constitute such circumstances.
25. Additional relevant human rights include the right to equality, which includes the right to be free from violence; the right to security; as well as the right to privacy.
26. Discrimination against women is both a cause and consequence of violence against women. The *Convention on the Elimination of All forms of Discrimination against Women* (CEDAW) calls for the incorporation of the principle of the equality of women and men 'through law and other appropriate means'.¹⁸ This should occur through positive measures, such as the promotion of substantive equality, as well as through prohibitions on all forms of discrimination against women. Sanctions are also required in the event these rights are violated.
27. CEDAW General Recommendation No 12 recommends States' periodic reports to the Committee include information about 'the legislation in force to protect women against the incidence of *all* kinds of violence in everyday life' (emphasis added). This should include the perpetration of violence against women through the use of technology.
28. Article 9 of the *International Covenant on Civil and Political Rights* provides the right to liberty and security of person. We welcome discussion regarding Draft General Comment No. 35 on Article 9 which is intended to replace General Comment No 8. This Draft General Comment states the right to security of person is independent of the right to liberty. Furthermore, the right to security of person means the right to bodily integrity.¹⁹ We submit bodily integrity includes protection from psychological harm, such as through the use of technology to shame, humiliate, intimidate and/or harass women. Significantly, Draft General Comment No 35 proposes a requirement for State parties to 'respond appropriately to patterns of violence against categories of victims ... such as violence against women'.²⁰
29. Article 17 of the *International Covenant on Civil and Political Rights* provides a right to privacy. General Comment No 16 on Article 17: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation states 'the gathering and

¹⁵ CEDAW General Comment 19: Violence against Women, as contained in UN Doc A/47/38 (1992) at paragraph 9.

¹⁶ ICCPR, Article 19(3)(a)

¹⁷ ICCPR Article 19(3)

¹⁸ CEDAW, Article 2

¹⁹ Human Rights Committee, Draft General Comment No. 35 on Article 9: Liberty and security of person, CCPR/C/107/R.3, 28 January 2013 at para 3.

²⁰ Human Rights Committee, Draft General Comment No. 35 on Article 9: Liberty and security of person, CCPR/C/107/R.3, 28 January 2013 at para 8.

holding of personal information on computers, data banks and other devices, whether by public authorities or private individuals or bodies, must be regulated by law'.²¹

30. Further, 'effective measures have to be taken by States to ensure that information concerning a person's private life ... is never used for purposes incompatible with the Covenant'.²²
31. We strongly argue that using technology as a form of violence against women is incompatible with the ICCPR.
32. In addition to Australia's human rights obligations, we see no public interest in permitting the sharing of intimate images without free and informed consent or in the other activities outlined in paragraph 14.

The impact of a statutory cause of action

Question 2: *What specific types of activities should a statutory cause of action for serious invasion of privacy prevent or redress? The ALRC is particularly interested in examples of activities that the law may not already adequately prevent or redress.*

33. As outlined above, we are concerned by the growing use of technology to shame, humiliate, intimidate and/or harass women.
34. We refer to the recent scenario within the Australian defence force where a member of the defence force was convicted for secretly filming an intimate encounter with a woman which was shared with others without the informed consent of the woman.²³
35. We further refer to the recent dismissal of several soldiers from the Australian Defence Force who were members of a group that 'allegedly circulated videos and images of women with whom members of the ring had slept, along with demeaning commentary that included personal information about the women'.²⁴
36. Women who call our legal advice line also relay such scenarios to us. This kind of serious invasion of privacy often extends beyond the ex-partner sharing intimate images without free and informed consent to threats and blackmail by people to whom the ex-partner has shared the images asking for 'favours' so as not to circulate the material further.
37. It is therefore important that accountability mechanisms extend not only to the party that first shared the private content, but to any party that shares this with another person or threatens to share this with another party.
38. We also endorse the inclusion in a statutory cause of action for serious invasion of privacy prevent or redress the types of behaviour outlined in the submission by Women's Legal Services Victoria and Domestic Violence Resource Centre Victoria discussed at paragraph 14.

Information sharing without informed consent

39. In NSW there is a public policy development towards the sharing of information without informed consent in the context of changes to the domestic and family violence service

²¹ Human Rights Committee, General Comment No. 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art. 17) 4 August 1988, para 10.

²² Ibid.

²³ 'Army sacking over Skype sex scandal', *Sydney Morning Herald*, 9 November 2013

²⁴ David Wroe, 'Soldiers sacked over Jedi Council sex scandal', *Sydney Morning Herald*, 14 November 2013

delivery system. We believe there are inherent safety and breach of privacy risks which the digital era is enabling to occur more easily and should form part of this inquiry.

40. WLS NSW supports efforts made to improve responsiveness to disclosures of domestic and family violence and the importance of a co-ordinated, integrated and holistic response. However, we believe information sharing without consent is a very complex issue and requires careful consideration, particularly regarding the many and potentially serious implications of such information sharing.
41. We are particularly concerned about proposals to share information without informed consent in the context of the NSW Domestic and Family Violence reforms (DFV Reforms).
42. The NSW Domestic Violence Justice Strategy, released in December 2012, an element of these DFV reforms, expands the circumstances in which information can be shared without consent. The *Crimes (Domestic and Personal Violence) Amendment (Information Sharing) Act 2013* enables the police to share personal and health information of each primary person and associated respondent without informed consent where an interim apprehended violence order (AVO) has been made, an AVO has been sought or a person has been charged with a domestic violence offence.²⁵
43. The *Crimes (Domestic and Personal Violence) Amendment (Information Sharing) Act 2013* will remove imminence from the threshold in sharing information without consent in circumstances of serious threat to life, health or safety.²⁶ We further note the proposal to do this in the NSW Domestic and Family Violence Framework as well.²⁷
44. We understand information sharing protocols are required before the legislation can take effect and these are not yet available for analysis to determine their adequacy at the date of writing.
45. We agree if a victim is at imminent risk it may not be possible to obtain informed consent before sharing information. However, this is the current law in NSW.
46. WLS NSW believes there are inherent safety and breach of privacy risks which are not adequately addressed when informed consent is dispensed. For example, victims of violence, especially in small communities, may not wish to engage with a service to whom the NSW Police has provided their personal information because a relative of the perpetrator works at that organisation or the organisation does not work in a culturally safe manner.
47. Victims of violence within the LGBTIQ community may be reluctant to report violence for fear of being 'outed'.
48. Additionally, the sharing of information, both with and without informed consent, has the potential to undermine the efficacy of the sexual assault communications privilege in NSW. The broader the sharing of information with agencies outside a treating relationship, the more easily confidential and sensitive communications can be subpoenaed and potentially used against a victim of violence in a sexual assault hearing.
49. Such information may also be used by the perpetrator of violence in other court proceedings as a way of continuing the violence.

²⁵ Section 98C(1) *Crimes (Domestic and Personal Violence) Amendment (Information Sharing) Act 2013*.

²⁶ Section 98D *Crimes (Domestic and Personal Violence) Amendment (Information Sharing) Act 2013*.

²⁷ NSW Government, *It Stops Here: Standing together to end domestic and family violence in NSW*, 2013 at 23

50. Many women may be reluctant to report domestic and family violence to police as a result of information sharing without informed consent. WLS NSW is particularly concerned this will be the case with Aboriginal and Torres Strait Islander women.
51. Information sharing without consent will also impact upon those defending AVOs but on further enquiry into their circumstances are victims of domestic violence – the primary aggressor being their partner and the person the police initially assessed as being the 'person in need of protection'. It is unclear what opportunities will be in place to ensure incorrect information is corrected.
52. This must be addressed as General Comment No 16 provides the right to request rectification or elimination of incorrect personal data.²⁸
53. Concerns regarding the sharing of information without informed consent in the context of the NSW Domestic and Family Violence Reforms must be adequately addressed, including the development of information sharing protocols with input from those working in the domestic violence and sexual assault sectors.

Fault

Question 9: *Should the cause of action be confined to intentional or reckless invasions of privacy, or should it also be available for negligent invasions of privacy?*

54. While the NSW government has agreed to consult on the development of the information sharing protocols, given the serious consequences that can arise as a result of sharing information without informed consent in the context of family and domestic violence, we support a cause of action being available for negligent invasions of privacy as well as intentional or reckless invasions of privacy.

Defences and exemptions

Question 12: *In any defence to a statutory cause of action that the conduct was authorised or required by law or incidental to the exercise of a lawful right of defence of persons or property, should there be a requirement that the act or conduct was proportionate, or necessary and reasonable?*

55. WLS NSW supports the requirement that the act or conduct was proportionate, or necessary and reasonable.

Other remedies

Question 18: *Other than monetary remedies and injunctions, what remedies should be available for serious invasion of privacy under a statutory cause of action?*

56. WLS NSW agrees that there may be circumstances in which there may be other remedies other than monetary remedies and injunctions that are appropriate.
57. We support the suggestion of other remedies outlined in the Issues Paper, including an order requiring the defendant to apologise to the plaintiff; a correction order; an order for delivery up, destruction or removal of material; a declaration; an order that the defendant rectify its business or information technology practices.

²⁸ General Comment No. 16, Note 21 para 10.

58. However, WLS NSW believes that given the serious nature of some breach of privacy offences, in addition to a civil cause of action and civil remedies, criminal sanctions may be required to properly protect individuals from abuse.

Question 20: *Should the Privacy Commissioner or some other independent body, be able to bring an action in respect of the serious invasion of privacy of an individual or individuals?*

59. WLS NSW believes that an independent regulator, such as the Australian Privacy Commissioner should be able to bring proceedings on behalf of an individual or individuals.

60. WLS NSW agrees that this approach may better enable access to justice for those of limited means and other vulnerable persons.

61. We also believe that an independent regulator will be beneficial in cases where systemic breaches of privacy have occurred.

Question 24: *What provision, if any, should be made for voluntary or mandatory alternative dispute resolution of complaints about serious invasion of privacy?*

62. WLS NSW supports the use of alternative dispute resolution (ADR) options such as mediation or conciliation in appropriate circumstances. WLS NSW recognises that ADR options can provide a faster, cheaper and low-risk alternative to judicial proceedings.

63. However, WLS NSW believes that it is essential that referrals to mediation or conciliation are made after an assessment that such a referral is appropriate, rather than automatically.

64. Matters involving serious and ongoing 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.

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

66. If you would like to discuss any aspect of this submission, please Gabrielle Craig, Senior Solicitor or Liz Snell, Law Reform and Policy Coordinator on 02 8745 6900.

Yours faithfully,

Women's Legal Services NSW

Janet Loughman
Principal Solicitor