THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: HumanRightsGUvk:1070623

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Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Committee Secretary,

Inquiry into the phenomenon colloquially referred to as 'revenge porn', which involves sharing private sexual images and recordings of a person without their consent, with the intention to cause that person harm

Thank you for the opportunity to provide comments. The Law Society's submission is directed at terms of reference (c) in respect of potential policy responses to this emerging problem, including civil and criminal remedies.

1. Overview of the Law Society's position

The Law Society considers that there is little existing protection against, or adequate remedies for, serious invasions of privacy, including in respect of instances of "revenge porn".

Given the vastly increased technological capacity for capturing images and making recordings; and for rapid and large scale dissemination of digital material, we submit that there is utility in creating a new cause of action in tort for serious invasions of privacy. Such an action should be available where the plaintiff had a reasonable expectation of privacy. It should also allow for the court to consider all the circumstances including the nature of the private information, the means used to obtain the private information, the purpose of the misuse or disclosure of the private information or intrusion of privacy, the relevant attributes of the plaintiff and the conduct of the plaintiff. Fixed video surveillance devices should also be regulated in a similar way.

Invasions of privacy should only be actionable if they are "serious", taking into account the degree of offence, distress or harm to dignity the invasion of privacy is likely to cause to a person of ordinary sensibilities in the position of the plaintiff; and whether the defendant was motivated by malice, or knew that the invasion of privacy would offend, distress or harm the dignity of the plaintiff. Instances of revenge porn would likely be actionable under the new tort.

If a new tort is created, it should be expressly recognised in the legislation that the new tort is not intended to impinge on the implied constitutional right to freedom of governmental and political communication.

In this submission, we discuss in more detail the nature, and elements, of the proposed new cause of action.

We discuss also the adequacy of existing criminal offences and conclude that while the existing legislation is adequate to prosecute 'revenge pornography' behaviour, the apparent reluctance of prosecuting authorities to use the existing legislation for behaviour targeting adults warrants further consideration, and the development of policy with a view to legislative reform if necessary.

2. Australian Law Reform Commission review of serious invasions of privacy in the digital era

The Law Society notes that the Australian Law Reform Commission ("ALRC") carried out an extensive review of serious invasions of privacy in the digital era, and reported on this review in 2014.[1] In its Report, the ALRC made a number of recommendations relevant to this review. We recommend the ALRC's Report to the Senate Committee for consideration. That Report considers the essential elements and features of a cause of action in tort; limitation periods and other procedural and substantive matters; defences; and, particularly relevant to this inquiry, the ALRC considers remedies at Chapter 12 of that Report.

The ALRC recommended that a new statutory cause of action, described as a tort, should be enacted in a Commonwealth Act.[2] The cause of action should provide that the plaintiff must prove either that his or her privacy was invaded in one of the following ways:

- Intrusion upon seclusion, such as by physically intruding into the plaintiff's private space, or by watching, listening to or recording the plaintiff's private activities or affairs; or
- Misuse of private information, such as by collecting or disclosing private information about the plaintiff. Such private information should include information that is untrue, but only if the information would be private if it were true.[3]

The ALRC recommended that the new tort should be actionable only where the plaintiff had a reasonable expectation of privacy, providing that the court[4] consider all the circumstances including the nature of the private information, the means used to obtain the private information, the purpose of the misuse or disclosure or intrusion, the relevant attributes of the plaintiff and the conduct of the plaintiff.[5]

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[1] Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, ALRC Report 123, (2014) ("ALRC R123"). The Law Society refers the Senate Committee also to the report of the ALRC, Report 108 – "For Your Information: Australian Privacy Law and Practice" (2008) and generally supports the report's recommendations in respect of the introduction of such a statutory cause of action. The Law Society recommends that any proposed legislation should follow those recommendations with certain qualifications, referred to below.

[2] ALRC R123, Recommendations 4-1 and 4-2.

[3] ALRC R123, Recommendations 5-1 and 5-2.

[4] The Law Society considered the issue of access to justice in respect of a new tort agrees with the view that remedies for serious breaches of privacy should be accessible. Such remedies should be enforceable, if a new norm of privacy is to be achieved. In this regard, court-based avenues of redress should be available, as one remedy amongst a suite of remedy options.

[5] ALRC R123, Recommendations 6-1 and 6-2.

The Law Society has made previously submissions to the ALRC on behalf of the HRC, supporting the creation of a Commonwealth cause of action in tort for serious invasions of privacy. The HRC endorses the ALRC's recommendations in relation to the types of invasions of privacy that the new tort should cover, as set out in recommendations 5-1 and 5-2 of the ALRC's Report.

The ALRC made a number of recommendations in respect of remedies and costs, extracted and attached at "A". The Senate Committee's inquiry into this issue may be assisted by consideration of these recommendations.

3. A new tort

The Law Society supports the creation of a cause of action in tort for serious invasions of privacy.

Australia ratified the International Covenant on Civil and Political Rights ("ICCPR"), the main international human rights treaty, in 1980 and at that time adopted an obligation under international law to implement into our domestic laws, the provisions of that treaty.

Article 17 of the ICCPR commits our governments to legislate to prevent a person being "subjected to arbitrary or unlawful interference with his privacy..." Further, Article 2(3) of the ICCPR provides that a person whose ICCPR rights are infringed should be provided with "an effective remedy". Given that there is no generally applicable cause of action in Australian common law for serious invasions of privacy, we submit that a statutory cause of action should be introduced.[6]

A tort will establish clear limits of acceptable behaviour. Compared to the current situation, a statutory cause of action is also likely to be immediate, precise and technology neutral. Importantly, it recognises the human right to privacy. We consider that the tort should only apply to natural persons, and that ccorporations or other artificial persons should not be able to bring privacy cases (see recommendation 10-2). It may be appropriate for the Office of the Australian Information Commissioner to be provided with the resourcing and the power to determine complaints about conduct that falls within the proposed cause of action.

If a new tort is created, it should be expressly recognised in the legislation that the new tort is not intended to impinge on the implied constitutional right to freedom of governmental and political communication.

The ALRC Report canvassed the issue of the adequacy of existing remedies for serious invasions of privacy, including the equitable action of breach of confidence.[7] The ALRC noted that in the UK, recommendations have been made against introducing a statutory cause of action.

However, there have been significant and extensive common law developments in the UK, where the equitable action for breach of confidence has been extended,[8] under the influence of its *Human Rights Act 1998* (UK). This Act requires courts to

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[6] The introduction of such a cause of action may conflict with the ICCPR right of freedom of expression (Article 19). The cause of action would therefore need to be tailored to balance that right with the new cause of action, to the extent they conflict.

[7] ALRC R123 summary, at [1.25] – [1.26]

[8] *Campbell v MGN Ltd* [2004] 2 AC 457 as cited by the ALRC in its Report.

give effect to the protection of rights and freedoms in the European Convention on Human Rights. There is no equivalent legislative protection of human rights in the Commonwealth.

Given this, the Law Society expresses doubt whether relying on the equitable action for breach of confidence in Australia would provide equivalent protections against serious invasions of privacy. The ALRC Report also notes that five Canadian provinces have enacted statutory torts for the invasion of privacy, and that they have been well established in the United States for many decades (subject to free speech limitations).[9]

4. Fault

While noting that the ALRC recommended that the cause of action should be confined to intentional or reckless invasions of privacy (recommendation 7-1), the Law Society agrees with the Victorian Law Reform Commission's ("VLRC") view in its 2010 report[10] that the new cause of action should not be restricted to intentional or reckless acts but should, in appropriate cases, extend to grossly negligent acts.

5. Seriousness and proof of damage

Recommendation 8-1 of the ALRC's Report that invasions of privacy should only be actionable if they are "serious", taking into account the degree of offence, distress or harm to dignity the invasion of privacy is likely to cause to a person of ordinary sensibilities in the position of the plaintiff; and whether the defendant was motivated by malice, or knew that the invasion of privacy would offend, distress or harm the dignity of the plaintiff.

The Law Society recommends that a new legislative cause of action should make explicit what the term "likely" means. In the ALRC's review, it was suggested that "likely" should mean "a real possibility that cannot be ignored having regard to the nature and gravity of the feared harm in the particular case."[11]

We agree with the ALRC's recommendation 8-2 that the plaintiff should not be required to prove actual damage to have an action under the new tort.

6. Onus of proof

The ALRC recommended that the court must be satisfied that the public interest in privacy outweighs any countervailing public interest, making a separate public interest defence unnecessary (recommendation 9-1). The ALRC also recommended that the defendant should bear the burden of adducing evidence that suggests that there is a countervailing public interest for the court to consider, but that the plaintiff should have the legal onus to satisfy the court that the public interest in privacy outweighs any countervailing public interest raised in the proceedings (recommendation 9-3).

The Law Society has some reservations in respect of recommendations 9-1 and 9-3. Requiring the plaintiff to have the legal onus of proving that their interest in privacy outweighs any competing interest raised by the defendant may result in cost

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[9] ALRC R123 summary, at [1.30] – [1.31]

[10] Victorian Law Reform Commission, *Surveillance in Public Places*: Final Report 18, (2010) 152.

[11] Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* Discussion Paper 80 (2014) 101.

implications for the plaintiff. This is because it may enable the defendant to raise potentially spurious public interest issues and the plaintiff would have to show that each of those issues is outweighed by their interest in privacy. We submit that the Senate Committee might consider a public interest defence approach that would put the legal and evidentiary burden on the defendant to show a countervailing public interest.

7. Forums, limitations and other matters

7.1. Forums

The ALRC recommended that federal, state and territory courts should have jurisdiction to hear an action for serious invasion of privacy under the proposed Commonwealth cause of action (recommendation 10-1). The Law Society supports this proposal.

7.2. The cause of action should not survive for the benefit of the plaintiff's estate or against the defendant's estate

The ALRC recommended that 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 (recommendation 10-3).

We note that the protections in the *Privacy Act 1988* (Cth) ('*Privacy Act*') only apply to living persons. A complaint cannot be brought under the *Privacy Act* in relation to the handling of an individual's personal information following the death of that individual, unless the complaint was lodged prior to the individual's death.

To ensure consistency with this position, it is our view is that the cause of action should be restricted to living persons, or privacy invasion actions commenced prior to an individual's death.

7.3. Representative actions

The Law Society submits that there should be provision for an action to be brought on behalf of the plaintiff who is unable to commence proceedings on their own behalf by a guardian ad litem.

7.4. Limitation periods

The Law Society is of the view that limitation periods should mirror those contained in the *Privacy Act*, acknowledging that the decision to bring a court action with its attendant costs and stresses may involve a more lengthy decision making process than, for example, the decision to make a complaint to the Office of the Australian Information Commissioner.

8. Defences

Consistent with the ALRC recommendation 11-3, a defence of necessity should be provided for in the legislation.

Further, the ALRC recommended that provision should be made for a defence of "fair report of proceedings of public concern" (recommendation 11-7). If the Senate Committee is minded to make a similar recommendation, we submit that "public

concern" should be closely defined in order to prevent exploitation of this defence, for example by paparazzi or tabloid journalists.

We support the suggestion of the VLRC in its report that there should be a public interest defence to the proposed cause of action which would enable the balancing of the public interest in maintaining a claim in privacy with the interest of the public to be informed about matters of public concern and to allow and protect freedom of expression.[12]

9. Remedies and costs

The Law Society submits that compensatory damages should be available, including damages for emotional distress. This view is consistent with the ALRC's recommendation 12-1.

The ALRC recommended also that there should be a cap on damages for both non-economic loss and any exemplary damages; and that the cap should not exceed the cap on damages for non-economic loss in defamation (recommendation 12-5).

The NSW Law Reform Commission in its 2009 *Report 120: Invasion of Privacy*[13] recommended that damages for a statutory cause of action should be capped in relation to non-economic loss.

The Law Society agrees that there should be a cap on damages for non-economic loss and exemplary damages. The cap should be tailored, as far as possible, to avoid different caps being prescribed for the proposed cause of action and actions for defamation, to prevent "cause of action shopping". However, we caution against a damages cap that is set too low such that the cause of action will not be fully compensatory.

10. Regulation of video surveillance

In respect of a related issue, we note that video surveillance devices are widely available and might now include technology such as cameras in mobile phones, and drones. The Law Society's view is that at minimum, the use of fixed video surveillance devices should be regulated by statute.

The VLRC considered the issue of modernising the *Surveillance Devices Act 1999* (Vic) ("SDA") in its *Final Report into surveillance in public places.*[14] We refer the Senate Committee to Chapter 6 of this report as relevant to this inquiry.

The VLRC considered the improper use of surveillance devices and noted that the different types of surveillance devices are currently regulated inconsistently.

The VLRC came to the view that the SDA should be modernised to regulate improper use of surveillance devices, regardless of the type of device used[15] and made the following recommendations:

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[12] Victorian Law Reform Commission, *Surveillance in Public Places: Final Report 18* (2010), 156.
[13] NSW Law Reform Commission, *Invasion of Privacy*, Report 120 (2009), 50.
[14] Victorian Law Reform Commission, *Final Report into surveillance in public places*, 1 June 2010, available online: <http://www.lawreform.vic.gov.au/projects/surveillance-public-places/surveillance-public-places-final-report>
[15] Ibid, 122.

20. A new offence should be included in the SDA that makes it unlawful to use a surveillance device in such a way as to:

    a. intimidate, demean or harass a person of ordinary sensibilities; or to
    b. prevent or hinder a person of ordinary sensibilities from performing an act they are lawfully entitled to do.

21. A civil and alternative criminal penalty should apply for breach of the offence. The regulator should be permitted to commence proceedings for the imposition of a civil penalty.[16]

The VLRC noted that, "The primary purpose of such a new offence would be to send a clear message to the community that various forms of behaviour with a surveillance device are unacceptable."[17]

We endorse the view of the VLRC as set out above.

The existing torts of nuisance and trespass have restricted application. Trespass to the person and trespass to land require a physical interference, as the ALRC has recently noted.[18] The ALRC commented that surveillance is not caught by those torts without at least a physical threat (as to trespass to the person) or an intrusion onto the land (as to trespass to land).[19]

The ALRC also pointed out that trespass to land is not an available remedy to a claimant in a public space or to someone who is not an exclusive occupier of the private land concerned.[20]

In relation to the tort of nuisance, again the ALRC noted that only an exclusive occupier of land can sue, and even family members of an occupier are excluded.[21]

Further, these existing torts do not adequately address breaches of privacy made possible by advances in surveillance technology, including video surveillance, particularly if one of the aims of reform is to send a normative signal in respect of acceptable and unacceptable behaviour.

11. Adequacy of existing criminal offences

Although there are no existing laws specifically created to combat revenge pornography, we note the *Criminal Code Act 1995* (Cth)[22] criminalises behaviours which involve sharing private sexual images and recordings of a person without their consent, with the intention to cause that person harm.

Section 474.17 of the *Criminal Code* applies to both adults and children and provides as follows:

> 474.17 Using a carriage service to menace, harass or cause offence

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[16] Ibid, 125.
[17] Ibid, 122.
[18] Australian Law Reform Commission, Final Report, *Serious Invasions of Privacy in the Digital Era*, 3 September 2014, [3.37], available online: <https://www.alrc.gov.au/publications/3-overview-current-law/existing-common-law-causes-action-0>
[19] Ibid.
[20] Ibid [3.38].
[21] Ibid [3.39].
[22] Section 474.17, *Criminal Code Act 1995* (Cth)

(1) A person is guilty of an offence if:

(a) the person uses a carriage service; and

(b) the person does so in a way (whether by the method of use or the content of a communication, or both) that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive.

Penalty: Imprisonment for 3 years.

Additionally, there are provisions in the *Criminal Code* which protect children. In 2012-2013 the Commonwealth Director of Public Prosecutions prosecuted 376 child exploitation charges under the relevant sections of the *Criminal Code* including:

- section 474.19(1) – use carriage service for child pornography material;
- section 474.26(1) – use carriage service to procure person under 16 years of age;
- section 474.27A(1) – use carriage service to transmit indecent communication to person under 16 years of age.

Prosecutions were also made under s 233BAB(5) of the *Customs Act 1901* (Cth) (importation of tier 2 goods).

While prosecutions for offences applying to children have been undertaken under the provisions cited above, the Law Society notes that in an interview to *The Australian* newspaper, an Attorney-General's Department spokesperson stated that:

> This offence has been used in the past to prosecute threatening online comments, including in serious cases of cyber-bullying and, depending on the circumstances, may also apply in cases described as 'revenge porn'....
>
> However, it's understood there have been no Australian-led prosecutions for revenge porn or malicious reposting - and few anywhere in the world - despite clear evidence that Australian women are being targeted[23].

While the existing legislation was not (and at the time could not have been) specifically drafted to deal with these kinds of offences which have arisen out of advancing technology, it would appear to be capable of use to successfully bring prosecutions for 'revenge pornography'.

The Law Society notes that the Law Council of Australia ("LCA") has raised concerns that the drafting of s 474.17 may be insufficient to deal with the specific harms inflicted by this type of behaviour:

> There are concerns that the existing criminal offences do not adequately cater for the range of behaviours encapsulated in the concept of 'revenge pornography', and that they fail to adequately capture the social and psychological harm that results from the use of sexual imagery to harass, coerce or blackmail women.

The LCA also raised a concern that s 474.17 may not be appropriate given its broad scope:

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[23] The Australian, *Revenge Porn Spreading Like Wildfire* http://www.theaustralian.com.au/news/latest-news/revenge-porn-spreading-like-wildfire/story-fn3dxiwe-1226766034486.

> For example subsection (2) of the offence section refers to its applicability to emergency call persons and APS employees among other professionals. While it seems that a revenge pornography scenario could be captured under the Commonwealth legislation, a more targeted offence may be a more effective solution to addressing revenge pornography behaviour.[24]

We concur with the LCA that existing legislation appears to be capable of capturing revenge pornography behaviour, but that further consideration might be given to the amendment of the present provisions to provide greater specificity. In particular, amendment might be required in respect of any intent of the accused to humiliate, harass and coerce the victim, and to ensure that the legislation is responsive to evolving technologies.

The introduction of more targeted offences to deal with such behaviour was considered at the time of the introduction of the Criminal Code Amendment (Private Sexual Material) Bill 2015 (Cth). The Bill and Explanatory Memorandum were presented in a second reading to the House as a new form of telecommunications offence by Mr Tim Watts MP:

> These offences will prohibit people from sharing private sexual images and films of others without their consent—a practice that is colloquially known as 'revenge porn'...Revenge porn is the most extreme example of how some men are using new technologies to exercise power and control over the women in their lives. It is an increasingly common manifestation of family violence....
>
> Both the actual and threatened distribution of these images without consent is a violation of a person's autonomy, of a person's control over their own body. It should be seen as a form of sexual assault[25].

The Bill contemplated the creation of an offence for a person to share sexual images and films of a person without their consent where it would cause them distress or harm, specifically targeting behaviours designed to humiliate others as an act of revenge.

In commenting upon the Bill, the LCA also noted some practical advantages of the creation of more targeted offences:

> The introduction of specific revenge pornography legislation may also increase public awareness of the "revenge porn" phenomenon, increase the frequency with which victims report the matter to the police, and increase the willingness of the police and prosecution agencies to bring prosecutions[26].

We conclude that, while the existing legislation is adequate to prosecute 'revenge pornography' behaviour, the apparent reluctance of prosecuting authorities to use the existing legislation for behaviour targeting adults warrants further consideration, and the development of policy with a view to legislative reform if necessary.

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[24] Law Council of Australia, Criminal Code Amendment (Private Sexual Material) Bill 2015 https://www.lawcouncil.asn.au/lawcouncil/images/3066_-_ALP_Revenge_Porn_Exposure_Draft_Bill_2015.pdf

[25] Hansard, Criminal Code Amendment (Private Sexual Material) Bill 2015, Second Reading, Monday 12 October 2015, 10693 http://parlinfo.aph.gov.au/parlInfo/download/chamber/hansardr/1d38c79d-f3f8-401a-81d0e364715774a5/toc_pdf/House%20of%20Representatives_2015_10_12_3843_Official.pdf;fileType=application%2Fpdf#search=%22chamber/hansardr/1d38c79d-f3f8-401a-81d0-e364715774a5/0020%22

[26] Ibid.

The Law Society thanks you again for this opportunity to provide comments, and would welcome the opportunity to provide further information to the Inquiry if it would be of assistance. Please direct any questions to Vicky Kuek, Principal Policy Lawyer, on 9926 9926 or by email to victoria.kuek@lawsociety.com.au.

Yours sincerely,

Gary Ulman
President