

COMMITTEE ON THE OFFICE OF THE OMBUDSMAN, THE POLICE INTEGRITY COMMISSION AND THE CRIME COMMISSION

2016 REVIEW OF THE ANNUAL REPORTS OF OVERSIGHTED BODIES

DR ELIZABETH COOMBS – NSW PRIVACY COMMISSIONER

QUESTIONS ON NOTICE – 3 MARCH 2016

Question

Mr PAUL LYNCH: *I am wondering what your view is of criminalising the publication or sharing of sexually explicit material without consent as opposed to pursuing it by way of a statutory tort. The other alternative, which I think they have done in Victoria, is to pursue it as a criminal offence. I am wondering whether you think that is sensible or likely to work. What is your view?*

Dr COOMBS: *I think it is a complex issue. I was listening to the radio this morning and I heard that there has been a report just released about the amount of sexually graphic imagery which is put up by the young people themselves on the web. I do understand the criminalisation aspects or the benefits that may come from that but I do have concerns. I would like, though, to take that question on notice for a greater, more in depth response.*

Mr MCLAUGHLAN: *Offences are good for registering the outrage of society in relation to what has taken place whereas the tort can be more specified to the individual and provide access to direct forms of compensation.*

Answer:

As noted above a crime is an offence against society, a public wrong, where there is a defined punishment under the relevant Act. For example the NSW Crimes Act 1900 contains provisions for murder (s19A) and robbery (s94) where there are definitive jail terms mandated (ie life and 14 years respectively). While mitigating circumstances are to be considered at sentencing the scope is limited to a jail term.

Tort law has been designed and developed to address more private or civil wrongs, where there has been a wrong against an individual. There are many varied remedies for torts ranging from financial damages being awarded, to apologies, take down orders and cease and desist orders being issued.

An act can be both a crime and a tort. One such example is the act of negligent driving which is both a crime and a tort. *The Road Transport Act 2013 (NSW)* s117 sets out the offence of “Negligent, furious or reckless driving” with penalties ranging from fines, periods of licence disqualification and possibly terms of imprisonment. In addition there is the tort of negligence that applies to driving and is well established in Australian case law.

Australian case law has not kept pace with society and its use of technology and particularly in the area of serious breaches of privacy. The need for a statutory tort, as opposed to letting case law develop at its own pace, was raised over the course of the Public Hearings of the Law and Justice Committee’s *Remedies for the serious invasion of privacy in New South Wales (Inquiry)*. To give certainty to the cause of action for serious breach of privacy and provide a number of mechanisms for seeking remedies the Inquiry sought to quickly address the gap that had developed in what the law currently allows and what should be available under the law.

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The range of recommendations made by the Inquiry provide for the more practical statutory cause of action to enable a complainant to access a range of mechanisms to have their matter heard in appropriate circumstances. These additional mechanisms are cost effective and can be tailored to right the wrong complained of rather than a 'one size fits all' remedy. For example under the proposed statutory cause of action the complainant can seek redress from the Privacy Commissioner, the New South Wales Civil and Administrative Tribunal or the courts. The actions available at this level are also quicker to achieve and can prevent further trauma to the complainant.

Having a criminal offence and an established common law cause of action is welcome as it acknowledges the adverse impacts of a serious invasion of privacy as a public wrong but provides practical cost effective mechanisms for complainants to seek redress. The Inquiry has found the right balance in its recommendations.