WOMEN'S LEGAL SERVICES NSW

Incorporating
Domestic Violence Legal Service
Indigenous Women's Legal Program

24 November 2015

The Director
Standing Committee on Law and Justice
Parliament House
Macquarie St
Sydney NSW 2000

By email: lawandjustice@parliament.nsw.gov.au

Dear Director,

Inquiry into remedies for the serious invasion of privacy in New South Wales – questions on notice and supplementary questions

1. Thank you for the opportunity to appear before the Legislative Council Standing Committee on Law and Justice. In this submission we respond to questions on notice and supplementary questions.

Question on notice – Damages

In terms of damages, a number of people have suggested that you should be looking at a scale similar to the Defamation Act, which attaches to the maximum damages under the Civil Liability Act for a personal injury. Is this the kind of regime you are looking at or do you think if we had a statutory cause of action a more modest form of monetary damages might be appropriate?

2. We understand that there are advantages and disadvantages both for a modest form of damages for a statutory cause of action for serious breaches of privacy and for damages at a scale similar to defamation.

3. One advantage of a modest form of damages includes increasing its accessibility to more people. A disadvantage could be that serious breaches of privacy, particularly those we have described in our initial submission as a form of violence against women, are not seen to be as serious as damage to a person's reputation, though the two make be linked. The inverse applies to damages at a scale similar to defamation.

4. In response we recommend that in addition to court there be a just, quick, cheap and accessible complaints mechanism, similar, for example, to how the Australian Human Rights Commission manages complaints. Remedies should include an apology, take down and deliver up requests and monetary compensation.

5. A court pathway with larger damages should also be available.

6. In our initial submission we also recommended provision should be made to make legal processes accessible for example, technical assistance for impecunious claimants, availability of legal aid, limited cost provisions in lower courts or tribunals, court and fee waivers.

Supplementary question: Fault element

If the committee were to recommend a statutory cause of action for serious invasions of privacy, one option might be to recommend that a fault element encompassing negligence (as well as intent and recklessness) apply to corporations; while recommending a more limited fault element (intent and recklessness only) that would apply to natural persons. Do you have any concerns or comments in regards to this?

7. Due to the demand on our service to respond to a number of inquiries this year we have not had the capacity to fully consider this proposal and so we are unable to comment.

If you would like to discuss any aspect of this submission, please contact Liz Snell, Law Reform and Policy Coordinator on 02 8745 6900.

Yours faithfully,
Women's Legal Services NSW

J. Loughman

Janet Loughman
Principal Solicitor

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REPORT OF PROCEEDINGS BEFORE

STANDING COMMITTEE ON LAW AND JUSTICE

INQUIRY INTO REMEDIES FOR THE SERIOUS INVASION OF PRIVACY IN NEW SOUTH WALES

At Sydney on 30 October 2015

The Committee met at 10.15 a.m.

PRESENT

The Hon. N. Maclaren-Jones (Chair)

The Hon. D. J. Clarke
Mr D. Shoebridge
The Hon. B. Taylor
The Hon. L. J. Voltz

ALEXANDRA DAVIS, Solicitor, Women's Legal Services NSW, affirmed and examined:

LIZ SNELL, Law Reform and Policy Coordinator, Women's Legal Services NSW, sworn and examined:

CHAIR: Thank you very much for coming this afternoon. Would you like to make an opening statement?

Ms SNELL: Thank you. We thank the Committee for the opportunity to appear today. Women's Legal Services NSW is a community legal centre that aims to achieve access to justice and a just legal system for women. Amongst our specialist areas we provide legal services relating to domestic and family violence and sexual assault.

Over the past few years we have seen a significant increase in technology-facilitated stalking and abuse—that is, the use of technology such as the internet, social media, mobile phones, computers and surveillance devices to stalk and perpetrate abuse on a person. In particular, we are seeing a concerning trend of technology being regularly used against women by perpetrators as a tactic within the wider context of domestic violence. We support a New South Wales and Federal statutory cause of action for serious invasions of privacy that includes damages for emotional harm other than a psychiatric illness. It is important that this be as accessible as possible and that there also be other accessible options.

Ms DAVIS: The problem is manifold. There are three main hurdles that women in these situations face. The first is criminal laws. While some existing offences are broad enough to capture technology-facilitated stalking and abuse, we are not seeing them used. There are also gaps and deficiencies where the law has not yet caught up—for example, in relation to non-consensual sharing of intimate images.

The second challenge is police attitudes and evidence-gathering capabilities. There is an urgent need for training to overcome the common attitude that technology-facilitated harassment is somehow less serious and less harmful than behaviours in person and that proving that the offender is responsible is somehow more burdensome when technology is involved. The third challenge is access to remedies and support. There is a need for a quick, accessible way of obtaining a take-down order. There is also a need for specialist services that are trained to assist women to access comprehensive planning for the safe use of technology and to remove spyware from devices.

While there is already scope for apprehended domestic violence orders to be used by women experiencing technology-facilitated stalking and abuse, the laws are being applied inconsistently in these circumstances. We believe that the Crimes (Domestic and Personal Violence) Act 2007 should be clarified to better capture these behaviours and that amendments should be made to allow for take take-down and delivery-up orders. We note that this legislation has been under statutory review since 2011. We urge updated consultation and an exposure draft bill that contemplates the realities of technology-facilitated stalking and abuse.

We see technology as a double-edged sword. Although it is used to harass and intimidate women, we should not underestimate its ability to protect, support and connect women who are experiencing or have escaped domestic violence. It is not appropriate for victims to be told to stop using social media or to change their number or block the other party's phone. We need actions and remedies that will hold the perpetrator to account. Technology can also be used to assist in evidence gathering. With this in mind, we recommend that consideration be given to establishing an encrypted electronic device in all New South Wales police stations that could be used to quickly and cheaply scan a person's device for spyware or malware and allow police to access social media without firewalls and to extract relevant data in an admissible form. We believe that a joint strategy in civil and criminal law is necessary to combat this new frontier of violence against women.

CHAIR: Thank you. We will commence questions.

The Hon. LYNDA VOLTZ: I know this is a complex area. I have looked at the scenarios in your submission. This problem has been around for a long time. Obviously a national approach to it would be good, but that has not happened. If New South Wales introduced legislation to address the issue, would you see that as a stepping stone to a national approach? It is not going to solve the problem in the first scenario in your submission, though, is it? That was the story of Susan, whose partner created a fake Facebook account in her name.

Ms SNELL: I think there are a range of remedies that we would be seeking. For example, Alex has talked about the Crimes (Domestic and Personal Violence) Act. That would be one. Obviously that is a State-based piece of legislation and we would want there to be a few amendments in there, particularly around the positive power so that there can be take-down orders and deliver-up orders. That could happen now as one option. In terms of statutory cause of action, we would support both the New South Wales one and a Federal one precisely for the reasons that you are talking about in so far as we could be waiting for a considerable time for a Federal one so it is act now and have a New South Wales one. So yes, I think we would agree in terms of that.

The Hon. LYNDA VOLTZ: Because at some point someone has to start something.

Ms SNELL: Just on that point: it would be useful if there could be conversations across the jurisdictions in the hope that there could be uniform legislation, but that is a bigger question.

The Hon. LYNDA VOLTZ: That is another issue we have raised with some other people who have made submissions. There is a mechanism known as ministerial councils where the Ministers all meet every year or every second year and look at the legislation. So it is a matter of once you have got the legislation, getting it on to the agenda for a ministerial council.

Mr DAVID SHOEBRIDGE: Can you tell the committee about your rationale for including remedies in apprehended domestic violence orders and domestic violence proceedings? What is the rationale for having that remedy available in that manner?

Ms SNELL: For us it is important about it being an accessible remedy. We believe, given the majority of women that we are working with are women who are experiencing domestic and family violence and often AVOs might be a relevant part of their proceedings, AVOs are also, as we have talked about, in a Local Court, which is a more accessible avenue than perhaps a statutory cause of action would be, and we would see it as being a part of those proceedings; so it is an already existing proceeding and making that amendment in the legislation would give the court the power to make take-down orders and deliver-up orders. But the fact that it is a more accessible remedy is one of the reasons why we would argue for that to be. I think part of that would be in terms of education. On the one hand it is useful to have it in one space so that it is easy to access; on the other hand, it is also useful to have multiple different kinds of remedies. But I think primarily it is about that it be accessible.

Mr DAVID SHOEBRIDGE: And women are already involved in these proceedings. These are common issues that arise in these proceedings. In terms of a socially efficient way of responding to it this is perhaps one of the most socially efficient ways of responding to it. Is that right?

Ms SNELL: That is right.

Ms DAVIS: It is quick and it is cheap and we now have a lot more provisional orders being made by police on the spot where they suspect that a domestic violence offence may occur or has. They can also put in applications at that stage, or at any stage, for a take-down order.

Mr DAVID SHOEBRIDGE: In terms of the women who are coming to you for assistance, what proportion of them are facing these kinds of issues? What proportion of them would be benefited by having these kinds of remedies available?

Ms DAVIS: A huge amount. For example, this week I did a law clinic and had eight clients; five of those clients presented with issues of technology-facilitated stalking and abuse. That is just one day of a given week. So it is a huge issue and it is tangled up with other legal issues that are happening. It is often not just the one thing in isolation; there are often other things going on in the background as well. But it is a huge issue and there is no clear solution at the moment.

Mr DAVID SHOEBRIDGE: A number of people have suggested that we should consider an additional criminal offence. Your submission refers to section 578C of the Crimes Act and I think the one instance that you refer to it as being used is in *Police v Usmanov*, but that offence requires proof of the publishing of indecent articles. Can you explain to the committee what your concerns are about having a criminal remedy dependent upon a phrase "indecent articles"?

Ms DAVIS: Indecency in itself kind of refers to a victim-blaming state of mind. To say that the actual publication of the material is indecent, the language and semantics around that is almost importing that what the victim did was the indecent act, and it is detracting from the fact that this is actually something that has been done to her and she has been wronged. On top of that, most indecency offences traditionally are about being against the community standards. So what is that message that we are sending if this is something that is coming under an indecency offence? In other jurisdictions indecency is more narrow and it captures things such as where there is also violence or excrement or things that are against community standards more obviously than simply a woman taking a photo of herself which has been shared non-consensually. That is the real harm that has been done here, not her having an indecent photo in the first place.

Mr DAVID SHOEBRIDGE: One potential remedy for that would be to have a criminal offence that focuses upon the really offensive behaviour, which is not the original image or being in a position where your image is taken, but the criminality should relate to the sharing of it and the harmful sharing. Is that what you are saying?

Ms DAVIS: Yes.

Ms SNELL: The non-consensual sharing, yes.

CHAIR: In your submission you talk a little bit about the collection of evidence and you said that in your experience an individual police officer lacks the understanding of the technology involved or the rules of evidence and can be embarrassed in investigating the matter. Do you think that is a lack of understanding or is it a resource issue or is it both, and do you have suggestions on how that could be addressed?

Ms DAVIS: It is definitely both. So, speaking to individual police officers, there is a real inconsistency when you have matters in what they will tell you they are capable of and what they are not. But when it comes to matters going through court being investigated, charges being laid and the prosecution needing to build a case, there are a lot of issues of the admissibility and the form of the evidence. For example, if you have Facebook offences and women doing screen shots of that, if the person charged has a good defence lawyer they will bring up all sorts of challenges to that evidence and it will not be admissible. Those circumstances also depend upon access to justice and whether that person has representation because in some of those matters they do not. In terms of the actual evidence, perhaps Ms Snell may have something to add.

Ms SNELL: Could you repeat the question?

CHAIR: It is in relation to whether or not the police lack the understanding of what the technology is or what the laws are around it or is it that they just do not have the time and resources and therefore it is not being pursued properly?

Ms SNELL: As Ms Davis was saying, it is both. We think there needs to be continuous training with police about the nature and dynamics of violence. Ms Davis has already referred, in her opening statement, to how it seems as though technology-facilitated violence is treated as a lesser form of violence and we would challenge that. Also we think police would benefit by having training about the law itself and Ms Davis can speak to that possibly in a minute. The other area is in technology and we totally agree with you in terms of resourcing. There is the training issue and it is our experience that police do not seem to understand the technology and the gathering of evidence. But also, in terms of resourcing, another limitation is that we have been told it is expensive to gather such evidence. That is why one of the proposals we have put forward is about having a mechanism at the police station where a woman can go in with her device, meet a police officer and, through that, be able to gather an admissible form of evidence.

Ms DAVIS: The idea is that it would be prompted, so that there is less chance that the evidence is not in an admissible form and that it is something that could be useful to lay charges so that the matter does not simply disappear. As Ms Snell said, there are issues around the costs of evidence. One of our suggestions also was that there be a review by the Australian Communications and Media Authority [ACMA] into those costs that are under the Telecommunications Act, sections 313 and 314. While a carriage service provider is not to profit—and also not to incur any costs—police stations have reported to us that different providers charge different amounts. It also depends on the evidence one needs to get. If one had, for example, a device that was able to scan the evidence off the device and to also narrow down the scope of what needed to be found, police could save money. For example, if they needed to get something to do with telecommunications such as historic

sheets of a certain month or where the calls were from they could make it a little more targeted. They would not have the need to go on a fishing expedition which can cost a lot of money.

CHAIR: What is the device you are referring to? Is it something that is already out there?

Ms DAVIS: We have sort of made it up as something that could be developed. But when you see the technology that already exists, and the things that we are capable of, it does not seem like such a stretch to have something like that developed. Our suggestion is that something along those lines should be looked into or considered as a possible avenue.

Mr DAVID SHOEBRIDGE: Are you talking about capturing, say, text messages or the phone history but you are also talking about capturing somebody's Facebook page as well? Something more sophisticated than just a screen shot?

Ms DAVIS: To an extent. When it comes to Facebook, some police stations have told us that they cannot access Facebook within a police station because of firewalls that are in the police station. If that is an issue, this could be used to access that.

Mr DAVID SHOEBRIDGE: They should get on to the Shoalhaven Local Area Command Facebook page, as one example.

Ms DAVIS: Facebook has told us that there are informal mechanisms that police officers have access to but most lay officers that we talk to have no idea what we are talking about. Those mechanisms can be used to access subscriber information and basic information with Internet Protocol [IP] addresses and the names and emails that were used to set up that account. That could be helpful, for example, for apprehended violence orders, for the balance of probabilities, rather than actual beyond reasonable doubt, if it was a criminal charge.

With this issue of firewalls, if you had this mechanism and it was something that the police could access, a person could log into their account and the police officer could look at it themselves. Not only could you possibly get some form of evidence through technology that is beyond our engineering capacities, but also you would have the witness statement of that officer, looking at the content of that and being able to give oral evidence in court that could be cross-examined on.

The Hon. LYNDA VOLTZ: I am not sure that, in terms of technology, it quite works that way. Metadata would capture the IP address and would show you the page you looked at, what date you looked at it on and the account name but you will not necessarily capture the image itself. I would have thought that, if you had the screen shot, metadata would give police the ability to issue a warrant on the provider under the powers that have been introduced and they would be provided with information as to which account accessed that page on which day anyway.

Ms DAVIS: With Facebook we have been told that when they need the admissible evidence it needs to go to the State headquarters first. They need to get a subpoena, I suppose, for the actual company of Facebook in the United States. It is a long process that takes a lot of time, costs a lot of money and is not very accessible. Even when we are talking about phone records, I had one officer explain to me that they get 20 of these complaints a day and might take on five matters to investigate per month because they simply do not have the resources or the money to be looking up metadata or to find the evidence that is going to be admissible when it goes through to charges.

Mr DAVID SHOEBRIDGE: We are told that metadata does not capture the content of web pages but just the address and who was accessing it at particular times, particularly if someone is putting the offensive, intimidatory or harassing material on Facebook. What you are suggesting is that, for the test of balance of probabilities, having a police officer sight it, take screen shots of it, annex it to a statement and say, "I saw this on a particular day" might be a relatively low-cost way of getting to the balance of probabilities?

Ms DAVIS: Yes.

The Hon. LYNDA VOLTZ: Would they not just seize their computer and phone and that would provide them with information. At the end of the day, unless you take it back to the factory settings and wipe everything, it is all there.

Ms DAVIS: There are some issues about passwords and access but also we have had clients where the police refused to do that because of the costs and because running computer forensics is done by certain crime units. Those sorts of matters are usually reserved for indictable offences and things that are considered more serious than, for example, a breach of an Apprehended Violence Order [AVO] or a stalking or intimidation offence.

The Hon. LYNDA VOLTZ: I understand that it is about the seriousness and where the police are putting their priorities but that is about a police resourcing priority issue as opposed to the ability to grab the information which would be needed.

Mr DAVID SHOEBRIDGE: To address the bread and butter continual complaints that police stations are getting and not being able to deal with because of the cost of it being a Rolls Royce forensic approach, you are suggesting that they should be exploring ways of more cost effectively getting the evidence to assist in Apprehended Violence Order proceedings?

Ms DAVIS: Yes.

Mr DAVID SHOEBRIDGE: Have you had any willingness from the police when you have approached them with these ideas? What has the exchange been?

Ms SNELL: I do not think we have had the opportunity to do that yet.

Mr DAVID SHOEBRIDGE: Perhaps a recommendation from this Committee urging them to look at that would be the way forward?

Ms SNELL: Yes, that would be helpful.

The Hon. LYNDA VOLTZ: And if some of these offences became covered by criminal codes within themselves, that would certainly focus their attention perhaps more than issues that may not. For example, if there was an offence for transmitting naked photos of people and it became a criminal offence, it might make it easier.

Ms DAVIS: You would think so but we already have, for example, the Commonwealth Criminal Code which has the offence of using a carriage service to harass, intimidate or menace which is a criminal offence. Arguably some of these things would fall under that but we are not seeing those things being used. We are not seeing computers being seized for those sorts of analytics to be run on the computers.

Mr DAVID SHOEBRIDGE: The Committee heard interesting evidence from Dr Henry and Dr Powell from the La Trobe and RMIT universities earlier. They did a national survey of some 3,000 respondents and found that of people aged between 18 and 55 approximately 10 per cent of respondents—and it was statistically valid for the Australian population—had been the subject of harassment or sexting, or that sort of digital offence. But that the experience of men and women in regard to how they responded to it was starkly different. Women seemed to suffer more damage and anxiety from the same behaviour than men. Could that differential experience be part of the reason why our predominantly male police force is not responding in the same way that you would expect, or in the way that you would hope to protect and vindicate the rights of your women clients? When you show them an issue, you show them an image, you tell them about your client's experience and they might interpret that predominantly through male eyes and do not see the same level of offence or experience the same anxiety as your clients do.

add 'facilitate'

Ms SNELL: I think it would be fair to say that we certainly face some challenging attitudes from police at times. As we said before, this type of technology abuse seems to be treated as a lesser form of violence so that is certainly part of the challenge in how to respond to the issue.

Ms DAVIS: I think as well that a lot of the harm is compounded by outdated expectations of women and other sorts of attitudes towards women, which makes the victimisation experience different to how it may affect men.

Mr DAVID SHOEBRIDGE: This would only be anecdotal evidence, but do you notice a difference between how male and female police officers respond to your clients when these concerns are raised?

Ms DAVIS: To be honest, I have had varied responses no matter whether it is a male or female officer. I still have female officers saying inappropriate things to my clients; they just tell them to get off Facebook or to ignore it. I think it is an attitude of minimisation across genders but probably more harnessed by males who might see this as a lesser issue and through the consumption of women anyway it seems more normalised.

Mr DAVID SHOEBRIDGE: Do you urge an education program targeted at police so that they become aware of the genuine distress that these things cause to women?

Ms SNELL: Definitely. When we talk about a better understanding of the nature and dynamics of domestic violence, that would certainly be a part of it.

CHAIR: Do you have evidence, or has anyone sought your advice, in relation to the misuse of surveillance devices or drones and an invasion of privacy? It is just another aspect of our inquiry.

Ms DAVIS: Surveillance devices is a really common issue; drones not so much. But we have a lot of clients where, for example, surveillance devices have been set up in their home without them knowing. We have clients who are separated under one roof, where they are still living with a perpetrator but in separate locked away bedrooms, and they find surveillance devices in their private rooms. But when they have called police the police have not taken action. For example, under the Surveillance Devices Act if it is an optical surveillance device then it is to do with the trespass, or going into property without consent. Even though you could argue that that space is occupied by a person, it is not with consent because of that occupation with the police not seeing eye to eye with us in some of those circumstances, and then you have women with no redress.

Also with surveillance devices you have a lot of spyware and GPS tracking and often the things that are most insidious are the things that we commonly use, Find my Phone in your iPhone or things that are linked up through Cloud computing and children being given devices that already have things on them. And while all of that should be covered by the Surveillance Devices Act as tracking devices as well as data monitoring devices we are just not really seeing any action being taken. One of the challenges as well is that a lot of women will suspect something is on there but how do they prove it? Many of these things can be remotely removed from the phone and are not detectable. We do not have services or things such as a device at a police station to plug it in to scan and to see whether it is there. Whilst individual companies and private entities might offer that sort of forensic scanning it comes at a cost and it is not easily accessible by our clients.

Mr DAVID SHOEBRIDGE: You have given scenarios where women are the subject of intrusive and obviously intentionally intrusive surveillance. Are there any instances where women have put surveillance devices in to protect themselves? Do we need to be careful of that in any statutory remedy?

Ms DAVIS: Yes, we need to be very careful of that because we have a lot of clients who will use technology to protect themselves—whether that is downloading an app on their phone so that they record conversations because they might have an apprehended violence order against a perpetrator who has a "no contact" order. If he repeatedly calls a woman, she wants the evidence and the intimidating things that he is saying so she records those conversations. There are exceptions in the Surveillance Devices Act for listening devices for when you are protecting your lawful interest, but we still need to be really careful about it. There are other instances when women might want, for example, those sorts of cameras and things in their houses because they are terrified that the perpetrator is going to try to break in. So we need to be really mindful that these technologies, while they are also being used to perpetrate violence, can be the things that assists our clients.

Mr DAVID SHOEBRIDGE: In your experience have there been any instances where your clients have found themselves facing an actual or potential prosecution because they have taken those kinds of steps to protect themselves—either recorded a conversation or installed a surveillance device? Have they ever been the subject of any threats?

Ms DAVIS: Not so much. It has been relevant before with how evidence has been collected for cases.

Mr DAVID SHOEBRIDGE: Whether it is admissible?

Ms DAVIS: Yes and whether section 138 of the Evidence Act would apply; whether that has been illegally or improperly obtained; and whether that value outweighs the way that it was obtained. We have not had any clients who have had charges against them for those sorts of things but we still need to be mindful of it, especially for a lot of our clients who, on changeover of a child, they might feel very unsafe and want to be able

to record what is going on as a protective mechanism for themselves. There are challenges sometimes by perpetrators that what you are doing is not legal but we have not had clients prosecuted that I am aware of.

Mr DAVID SHOEBRIDGE: In those circumstances when you have a changeover happening, the woman is very concerned about her personal safety, there may be no outstanding orders and she decides that to protect herself she will record what is going on. If she is recording the sounds and her former partner objects to it, is she in legal peril in those circumstances?

Ms DAVIS: It depends where it is. A lot of changeovers are happening in McDonalds and in public spaces and for listening devices it needs to be in private conversations. So in those circumstances she should be fine anyway. It is only an offence if it is a private conversation in that circumstance. There are certain things and precautions have to be taken also to keep women from stepping over any legal boundary.

CHAIR: You mentioned that there are instances when there have been no remedies for a woman once she has been turned away by police. What advice do you give these women? Can they continue or should they walk away frustrated with the system?

Ms DAVIS: It is difficult. We try to explore whatever avenues we can. It depends on the type of technology that facilitated the stalking and abuse. Sometimes we will be able to do advocacy for a private AVO application and certain additional orders that might make her feel safe—so drafting one for her particular circumstances. It is difficult with some forms of redress—for example, if you are trying to seek victim support—because you need to have something either that was intimidating or stalking or a personal violence offence. Intimidating falls within a personal violence offence for that person. We will explore those avenues and non-legal avenues. For example, if it was an image being shared non-consensually, there are different ways to try to get that taken down including by contacting webmasters having found that image online. We have certain technology safety planning things that we go through with our clients by virtue of going through legal advice and the different steps they can take. They often end up feeling lost and as if their problem is not legitimised by the law because they might not have redress or the perpetrator may not be held accountable.

CHAIR: I read about an overseas case of a girl whose friend took a photograph of her in the shower and a number of years later it went online. What advice could you give that client, although she is not Australian?

Ms DAVIS: Once it goes online you need to find where it is. If you cannot find where it is you cannot prove that it is out there or start different steps you need to take to try to get it taken down. There are certain ways of doing this—for example, a WHOIS search to find out who the webmaster is of a website. The advice we give will depend on whether it is in an Australian or overseas jurisdiction. If she had taken the image herself there is possible scope to use copyright law but that solution is ill-fitted to that sort of problem. Once the image is found she would then need to contact the police to get them to assist in any way they can. Under the current laws in New South Wales it would depend on whether the image was taken consensually or not—that will make a huge difference, which should not be the case because it should be about whether it was shared with consent. Voyeurism provisions and surveillance device provisions might be relevant if it was recorded without consent, but if it was taken as a joke or for a partner and it was passed on then it depends. She might be able to go down the route of publishing an indecent article. It also depends on whether the police take action and her civil remedies will be quite limited at this stage, which is why a statutory tort would be welcome.

Mr DAVID SHOEBRIDGE: Whilst you say it would be good to have a remedy in the apprehended domestic violence setting you also think that a statutory remedy is an important element. Do you adopt the Australian Law Reform Commission's proposal as a good starting point?

Ms SNELL: It is a good starting point but we also raised some concerns about a variety of aspects of that including in their principles, for example. We wanted to especially articulate around balancing of principles that the right to equality and freedom of violence be a part of that. In their last principle, which talks about shared responsibility, we have some concerns about how that may play out in a domestic and family violence context where you should be holding a perpetrator to account. If the focus is on telling ~~on~~ someone to change a password, there may be complications if the male has control of finances and the computer so that would not be a simple thing to do. We accept the principle but with those concerns. We do support other elements, such as the seriousness of it. We certainly support remedies in terms of apology, injunctive relief, take-down orders, compensation et cetera. We particularly support the idea of having damages for emotional distress beyond psychiatric illness because we are aware that emotional distress presents in a variety of forms. In short, it would

be a good starting point and an exposure draft would be useful for further comment once it goes through the system.

Mr DAVID SHOEBRIDGE: In terms of damages, a number of people have suggested that you should be looking at a scale similar to the Defamation Act, which attaches to the maximum damages under the Civil Liability Act for a personal injury. Is that the kind of regime you are looking at or do you think if we had a statutory course of action a more modest form of monetary damages might be appropriate?

Ms SNELL: In damages we would want to see a range including punitive and exemplary damages. We will take your question on notice.

Mr DAVID SHOEBRIDGE: I would be more than happy for you to do so. In your submission you talk about concerns about limitations, as you see it, in the definitions under the Crimes (Domestic and Personal Violence) Act that prevent that Act from responding to the full range of stalking and intimidation of your clients. Can you talk us through those definitional limitations?

Ms DAVIS: Under section 16 of the Crimes (Domestic and Personal Violence) Act for the court to make an AVO they need to show that the protected person has fears and reasonable grounds for those fears of a personal violence offence or stalking or intimidation by the defendant. Then you have to home in on the definitions of intimidation and stalking. The definition of stalking is quite limited and specific to physical forms of stalking. That will not capture things like GPS tracking and using technology, so it is a bit outdated. Then you have to rely upon the definition of intimidation. There are three different parts to section 7. There is harassment or molestation and we think harassment should be wide enough to capture many of these things but it is not necessarily being interpreted that way. It is open to discretion and different readings so one of our suggestions is having a non-exhaustive list of things around harassment to make it clearer and the addition of unauthorised surveillance. That would capture things such as checking emails and messages and GPS tracking. Our recommendation is based on the equivalent Act in Queensland and its definition of unauthorised surveillance.

CHAIR: Unfortunately we have run out of time. You are asked to respond to any questions you have taken on notice within 21 days and any additional questions members have will be sent to you by the secretariat with the same 21 days in which to respond. Thank you very much for appearing before us today.

(The witnesses withdrew)