CORRECTED

REPORT OF PROCEEDINGS BEFORE

STANDING COMMITTEE ON LAW AND JUSTICE

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

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At Sydney on Monday 16 November 2015

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The Committee met at 9.30 a.m.

PRESENT

The Hon. N. Maclaren-Jones (Chair)

The Hon. D. Clarke
The Hon. D. Mookhey
Mr D. M. Shoebridge
The Hon. B. Taylor
The Hon. L. Voltz

CHAIR: I welcome everyone to the second hearing of the Standing Committee on Law and Justice inquiry into remedies for the serious invasion of privacy in New South Wales. Before I commence I acknowledge the Gadigal people, who are the traditional custodians of this land. I pay respect to the elders past and present of the Eora nation and extend that respect to other Aboriginals present. The inquiry is examining the adequacy of existing remedies for the serious invasion of privacy in this State. The Committee's terms of reference require it to consider the adequacy of existing remedies for serious invasions of privacy, including the equitable action of breach of confidence and whether a statutory cause of action should be introduced to respond to such invasions. In addition to these issues, a number of submissions to our inquiry have alluded to the capacity of the criminal law to respond appropriately to serious invasions of privacy.

Today is the second and final hearing we plan to hold for this inquiry. We will hear today from organisations representing the media and arts community—the Arts Law Centre of Australia, Free TV Australia and a group of media organisations, as well as academics Dr Normann Witzleb, the Public Interest Advocacy Centre and private consultant Ms Anna Johnston. Before we commence I will make some brief comments about the procedures for today's hearing. Today's hearing is open to the public and is being broadcast live via the Parliament website. A transcript of today's hearing will be placed on the Committee's website when it becomes available.

In accordance with broadcasting guidelines, while members of the media may film or record Committee members and witnesses, people in the public gallery should not be the primary focus of any filming or photography. I remind media representatives that they must take responsibility for what they publish about the Committee's proceedings. It is important to remember that parliamentary privilege does not apply to what witnesses may say outside of their evidence at this hearing. I urge witnesses to be careful about any comments they may make to the media or to others after they complete their evidence as such comments would not be protected by parliamentary privilege if another person decided to take action for defamation. The guidelines for the broadcasting of proceedings are available from the secretariat.

There may be some questions that a witness could only answer if they had more time or with certain documents at hand. In these circumstances witnesses are advised that they can take questions on notice and provide the answer within 21 days. I remind everyone that Committee hearings are not intended to provide a forum for people to make adverse reflections about others under the protection of parliamentary privilege. I therefore request that witnesses focus on the issues raised by the inquiry's terms of reference and avoid naming individuals unnecessarily. Witnesses are also advised that any messages should be delivered to the Committee through the Committee staff. Mobile phones should be turned off or placed on silent for the duration of the hearing.

ROBYN AYRES, Executive Director, Arts Law Centre of Australia,

JENNIFER ARNUP, Solicitor, Arts Law Centre of Australia, and

CHRIS SHAIN, Photographer, Arts Law Centre of Australia and Board Adviser to the Australian Institute of Professional Photography, affirmed and examined:

CHAIR: Before we commence with questions would any of you like to make an opening statement?

Ms AYRES: I will. Arts Law has made submissions on numerous occasions over the last eight years opposing the introduction of a statutory cause of action for the invasion of privacy but we understand the concerns that have given rise to the inquiry. However, Arts Law is concerned that the proposed law would be detrimental to the development of artistic and cultural works in Australia and would reduce freedom of expression and, in particular, the development of artwork depicting people in public places.

As a society we are reliant on the records and stories captured by artists to understand and connect to our past and present. Introducing a statutory cause of action would have a negative effect on arts practitioners who create artworks that portray or capture images of people in public places and writers and journalists whose freedom of expression is likely to be restricted by the statutory cause of action. Introduction of a statutory cause of action for privacy risks curtailing or damaging the genre of candid or street photography because of the confusion such legislation might cause amongst the arts community as to what is permissible.

Where laws are subjective in relation to certain artistic activities, artists generally avoid any activities which appear to be affected by those laws even when those activities are completely innocuous. For example, many photographers will now not photograph children in public places for concern that those images would be considered exploitative and as a result our public record of the life and times of children is now reduced. Before introducing a new cause of action for invasion of privacy Arts Law would like to see a much stronger human rights framework with the general legal right to freedom of expression and specific right to freedom of artistic expression enshrined, as well as the right to privacy.

CHAIR: Thank you very much. We will now move to questions, starting with the Deputy Chair.

The Hon. LYNDA VOLTZ: In regards to the detrimental effects on the arts community that would substantially outweigh any other benefits, your concern there is the ability to take photographs of people in public places, is that right?

Ms AYRES: It is not just the photographs in public places; also filming in public places. It could be actually painting of people in public places—a range of artistic activities which occur that are now perfectly legitimate in public places could well be captured under a new cause of action for serious invasion of privacy.

The Hon. LYNDA VOLTZ: You had 250 complaints that involved privacy and trespass issues. In particular, what were the types of privacy complaints that were dealt with?

Ms AYRES: Ms Arnup may be able to speak about that specifically?

Ms ARNUP: Yes. I would not necessarily call them complaints. We give legal advice to a whole range of artists and arts organisations. When we give advice about privacy, they might be concerns that lots of street photographers have about taking photos in public places or there might be concerns from film-makers who might be filming public activities or filming in a public place. That is the extent of privacy advice that we give.

The Hon. LYNDA VOLTZ: The statutory cause of action is for serious invasion of privacy. It would hardly cover those scenarios, would it?

Ms AYRES: It would depend a lot on how such a cause of action was framed. Our concern is that some of the proposals we have seen to date—probably the most considered being the work of the Australian Law Reform Commission—is that the potential to capture activities such as family life that occurs in public places could well fall within the ambit of such legislation which I think would be quite detrimental to the historical record or the current way we see ourselves. I can think of a whole lot of photographs in my mind of scenes celebrating the end of the Second World War, for example. There are classic photographs of couples

celebrating, enjoying a kiss or dancing in the street. That could well fall within the way some of the legislation has been proposed in terms of an intimate family matter, which a photographer would then be very concerned about taking a photograph of because of the fact that it may be an invasion of privacy.

The Hon. LYNDA VOLTZ: Quite often photographers ask permission before they take those photos, do they not?

Mr SHAIN: No, it is not possible.

Ms AYRES: No, not always; it just depends; trying to capture a candid moment. You would actually lose the whole essence of what the photograph is about. Chris Shain is the expert rather than me on those professional photographers and some of the genres that we are talking about.

The Hon. LYNDA VOLTZ: Perhaps he can give me an example of the complaints?

Mr SHAIN: Let me be clear; I am not a lawyer with the Arts Law Centre so I do not know about those sorts of details. From personal experience and from anecdotal experience with the organization that I work with, it is a day-to-day problem with misunderstandings mostly. You can walk down this street here, for instance, and you might get a private security guard come up to you and say, "You cannot take pictures here". Now I am not entirely sure why that would be the case. One of our concerns, certainly from the industry's point of view—and Arts Law has certainly made this quite plain—is the potential for this legislation, if it is too far reaching, to have a huge chilling effect on people going about their daily professional activity, let alone artistic activity. There would be lots of pictures, as Ms Ayres has quite rightly pointed out, that would not be able to be taken if the privacy legislation was ramped up. The State Library next-door is just completely chockablock full of images of our social history. Let us not put a chilling effect on that.

The Hon. LYNDA VOLTZ: I get what you are saying but I do not understand why those photographs in the public domain would be covered by "serious invasion of privacy" when you are talking about photographs in the public domain.

Mr SHAIN: What we are trying to state very strongly is that this legislation, if it is broadened, has this potential effect because already we have trouble with people misunderstanding what "privacy" means to the general person in the street. Let us not introduce more stuff that is going to make it even more difficult. I am not a lawyer but I am advised by a lot by people who understand these things that there are perfectly adequate remedies at the moment for people to deal with privacy.

The Hon. DANIEL MOOKHEY: That is a segue to my question. In your submission you nominate a bunch of torts as well as various sections of legislation that you say provide a remedy to serious breaches of privacy. In your view do any of these torts or sections of legislation pose any undue burden on—

Mr SHAIN: On the artist?

The Hon. DANIEL MOOKHEY: —artistic expression?

Ms AYRES: I suppose one of the issues for clients we advise is there is an enormous amount of legislation they already have to navigate and they come to us asking for advice as to whether or not we can do something. An example would be a photographer who was proposing to take photographs of kids or people at the beach and a ranger told them they were not allowed to do that but actually they were allowed because in terms of the legislative framework in place there is nothing to stop them doing that. So there is misunderstanding—

The Hon. DANIEL MOOKHEY: But we are talking about more than the legislative framework; we are talking about the tortuous framework as well, are we not?

Ms AYRES: Yes.

Mr DAVID SHOEBRIDGE: The tortious not the tortuous. They are often similar.

Ms AYRES: We would be giving advice to artists around what is allowed and what is not allowed in terms of the framework that is in place. It does place some limits on our clients. I cannot give you a specific example of where we have given advice in relation to nuisance but we will have given that advice.

The Hon. DANIEL MOOKHEY: In respect of the torts you nominate—and we are looking into a statutory cause of action—to the extent to which any of these torts provide a remedy, they are somewhat incidental to the design or the original purpose of the tort. For example, you say "trespass to land". It is about 10 years since I looked at this tort and the last I recall it usually had its origins in preventing people from coming in and stealing stock amongst many others. To suggest that provides a bit of a breach—my point is that if you use the existing remedies you are essentially putting on the litigants to prove variations to these torts or at least adaptations to more modern forms. Do you agree?

Ms AYRES: This is the way the legislation is used. We have to give advice. For example, I am thinking of a film-maker who was threatened with action for trespass for filming on a particular piece of land. There was a big argument about whether the occupier had the right—I cannot remember the detail. The law is there and that is how they develop over time.

The Hon. DANIEL MOOKHEY: Indeed, but do you think there is an argument that this framework could be simplified for everybody's benefit? For example, your artists would not have to fend off trespass to land torts and the people who wish to access these torts would have a simpler framework to determine their rights.

Ms AYRES: I think it adds another layer of complexity for our clients. It is another lot of legislation they are going to have to navigate.

Mr SHAIN: All of us have been involved with the LRC proposals. There is Federal legislation; there is State legislation; we even have local councils trying to set up regulations about how a photographer can work in a public park. There are layers of stuff that goes on that makes it very difficult for us to go about our daily activity, which for 99.9 per cent of the time is not causing anybody in the society any issues at all. I think a lot of this seems to be developing—in the media release there was talk about drones and social media. That sort of stuff needs to be regulated for sure, but it is also a lot about, in the case of photography, how pictures are used rather than trying to have a policeman or ranger walk down the street and say to a photographer, "Don't take that photo." That would be a really bad scenario. Perhaps how it is used and then there is some personal responsibility for how people behave.

Mr DAVID SHOEBRIDGE: The current arrangement is confusing for many people. I too have seen security guards saying you are not allowed to take a photograph and ignored them. We have seen instances when police effecting an arrest say to people around that they are not allowed to film them. We know both those directions have no legal force because if you are in a public place taking an image of an event occurring in a public place there is no restriction on it. You say that is important for freedom of expression.

Mr SHAIN: Of course.

Mr DAVID SHOEBRIDGE: As you note the most worked-up proposal is the Australian Law Reform Commission's bill. There are a number of checks and balances in it that, on the face of it, seem to make it very clear that there will not be restrictions on that. First of all, there are two types of invasion—the intrusion into seclusion and a misuse of private information. It is hard to see how an embrace on George Street would be a seclusion that anyone is intruding into and it is also hard to see how it would be private information. There is also the question of a reasonable expectation of privacy, which is the plaintiff must prove that they had a reasonable expectation of privacy in all the circumstances. You do not see the reasonable expectation of privacy as being perhaps a cure for the ills you put forward?

Ms AYRES: I would like to see a higher threshold for the reasonable expectation of privacy. I agree that for the Australian Law Reform Commission's proposal, if such legislation was to be introduced, they have consulted widely and thought it through quite thoroughly. The intrusion into seclusion and misuse of information are well thought out in terms of addressing some of the issues. I still believe the sorts of examples the Australian Law Reform Commission have used in the proposal would potentially capture some of the behaviour we have mentioned whereas if there was a higher threshold, where the intrusion into seclusion activity was highly offensive, that would further restrict what would be found to potentially fall within the tort.

Mr DAVID SHOEBRIDGE: You might wish to come back to us with this on notice—if we were looking at the Australian Law Reform Commission's bill as the framework, are there some additional objects or provisions in it that you think would be important to ensure that the kinds of public interest points you have put forward, which I am pretty sure everyone on the Committee agrees are worthy and should be central to this investigation, are captured in the bill? For example, you might suggest there should be some further indicia that we consider when looking at what is a reasonable expectation of privacy of all the circumstances or a particular objective that it is not to unreasonably intrude on the freedom of expression and the like in the objects. Could you come back to us on that?

Ms AYRES: Yes, we could. But we have already made those points in the two submissions we made to the Australian Law Reform Commission.

Mr DAVID SHOEBRIDGE: But they have now produced the bill, so I wonder if you could comment on the specific wording of the bill. You do not have to; it is just an invitation.

Ms AYRES: I am just conscious of the resources that Arts Law Centre of Australia have. A week or so ago I gave evidence to the Senate inquiry looking at the cuts to the arts.

Mr DAVID SHOEBRIDGE: A good bill that reduces your work going forward would make your life easier over the next few decades, so that might be something to think about.

Ms AYRES: That is true and that is why it is incredibly important that if such legislation was to be introduced it was not done State by State. It is terribly difficult for artist to navigate such a complex web of various State legislations as well as Commonwealth legislation.

Mr DAVID SHOEBRIDGE: That is attractive but it is almost like a submission endorsing entropy because we will not get anything at a Federal level in anything like the near future, is that not so?

The Hon. DANIEL MOOKHEY: Besides, the Feds do not really have jurisdiction of these torts.

Mr DAVID SHOEBRIDGE: I say to you again: It is almost a submission inviting entropy because nothing is happening federally, is it not?

Ms AYRES: That is really a matter—

Mr DAVID SHOEBRIDGE: I would like to ask you quickly about *Giller v Procopets*. You point to the recent Western Australian case *Wilson v Ferguson* and say we should rest comfortably that the equitable remedies are developing because they provided $35,000 of non-economic loss in the case. But when you read *Wilson v Ferguson* it relies upon Giller and Giller is an as yet untested decision of the Victorian Court of Appeal, I think, which has not had any High Court approval and seems to be a vulnerable decision. Perhaps you could correct me if I am wrong on that.

Ms AYRES: I think we are going to the issue of whether or not we should allow the law to develop through the common law system rather than introduce a statutory right of privacy. The view we have expressed over a period is that it would be preferable for it to develop through the common law. I understand that the decision has not gone on appeal and so we do not have a higher court having endorsed it. But certainly from the High Court decision it is—

Mr DAVID SHOEBRIDGE: But the High Court decision is in 2001 and it basically said, "Well, we are not going to say absolutely no, but we are definitely not going to say yes and we will just kick it down the road a bit", did they not?

Ms AYRES: They left it open.

Mr DAVID SHOEBRIDGE: We are now 14 years down the track and we really have not seen an authoritative determination from the courts and there does not seem any near expectation we will get an authoritative determination, does there?

Ms AYRES: It is hard to know what is in the pipeline. But no, I do not know of any case that is likely to go before the courts.

The Hon. LYNDA VOLTZ: The Western Australian case rested on breach of confidence as opposed to serious invasion of privacy, did it not?

Ms AYRES: It was breach of confidence.

Mr DAVID SHOEBRIDGE: You see that in many cases where there is not a relationship of confidence per se where somebody has breached a person's privacy and therefore as the plaintiff in those circumstances did not know them and there was a wish that they did not have a private moment shared with the world, it would not get to first base on a breach of confidence basis—I think that is probably what Hon. Lynda Voltz is saying.

Ms AYRES: That is true.

Mr DAVID SHOEBRIDGE: That is a hole, is it not?

Ms AYRES: Yes, I agree that is a hole. But rather than introducing a whole new right of privacy that will have an impact on freedom of expression, it is preferencing one human right over another. I would rather look at what the holes are and what legislation could address those particular concerns than a wholesale introduction of invasion of a right to privacy.

Mr DAVID SHOEBRIDGE: Mr Mookey was suggesting that a very clear framework under privacy laws might make things clearer. If the privacy laws overtly make statements like, "There is no breach of privacy in taking a photograph in a public place of people embracing at the end of a war," that might clarify matters for photographers as they go about their work. It might do more good than harm. What do you say to that, Mr Shain?

Mr SHAIN: That is possible but, from experience, I know that there is very high-level legislation on a whole manner of things that photographers get involved in, including copyright, privacy—you name it. There are a whole lot of things that we get bailed up in the street about. When legislation like this is being proposed the one-percenters fire up. That is what gets on the front page of the *Daily Telegraph*, and that is what we get bailed up about. I spoke to the Australian Law Reform Commission [ALRC] about this issue. If legislation like this gets developed let us also develop really strong education campaigns—

Mr DAVID SHOEBRIDGE: Right at the outset—

Mr SHAIN: Right at the outset.

Mr DAVID SHOEBRIDGE: —so that a good culture and good knowledge are established.

Mr SHAIN: Absolutely, because that is where people can get into strife. I have been bailed up by security guards who say, "You can't take pictures here." I say, "Actually, I can." The security guards say, "This building is copyright."

The Hon. DAVID CLARKE: Ms Ayres, in your submission you put the proposition that you oppose a statutory cause of action because "the detrimental effects on the arts community would substantially outweigh any other benefits". What about benefits to the New South Wales public? Do you see that there are benefits to the New South Wales public from a statutory cause of action or do you not believe that there are any benefits at all to them?

Ms AYRES: I am not sure what problem, broadly, the legislation is trying to fix. I understand that there are some gaps and some specific concerns so, yes, I suppose the statutory cause of action would benefit people in those circumstances but whether that outweighs the potential detriment to freedom of expression is our big concern—as is the difficulty for the arts community in navigating another piece of legislation and trying to understand what they can and cannot do. Often legislation is at a principle level rather than using specific examples, which means that it is quite hard for creators to know what is allowed and what is not allowed. That is exactly what has happened with photographing kids in public places. Some research shows that there has been a reduction in our photographic record of children because of the chilling effect of the controversy around children and photography.

The Hon. DAVID CLARKE: You were pretty definite in what you said in your submission. You said not only that it would outweigh any other benefit but also that it would "substantially outweigh" any other benefits, including benefits to the public. That is a pretty broad, dogmatic statement to make, is it not? You are virtually saying that any benefits to the public are going to be outweighed by the detriments to the arts community that you represent.

Ms AYRES: We try to put a position strongly for the arts community but we have also acknowledged in our submission that if there are specific problems that need to be addressed then it would be better to do that through specific legislation. The concern is that the preferencing of privacy over freedom of expression will potentially have a chilling effect and be detrimental to the creativity—the creative expression—of New South Wales artists. That will also be detrimental to the public.

The Hon. DAVID CLARKE: Let us talk about specific legislation. Mr Shoebridge invited you to comment on the draft bill from the Australian Law Reform Commission and you said, "We've already dealt with that. We have been dealing with cuts to public funding and that takes our resources." Cuts to your right to operate would be at least as important, would they not, to cuts to your public funding? When you have been invited to comment on a specific bill do you not think that that is worthwhile doing?

Ms AYRES: It is absolutely worthwhile doing. I am just very conscious of the resources that we have available to us at the moment. I do think it is very worthwhile and we will endeavour to make those responses.

The Hon. DAVID CLARKE: Keep in mind that those cuts to your rights would be at least of similar importance to your community as cuts to public funding.

Ms AYRES: We are here because we have a commitment to Australia's artists. We are the only organisation in Australia that provides legal advice to artists and arts organisations right around the country, including Indigenous arts, and we have a staff of 10.5 people. We try to do the advocacy work as best we are able with the resources that are available to us.

The Hon. DAVID CLARKE: This is a pretty important thing. You have been asked to comment specifically in regard to your concerns about a particular bill. That is pretty important. There cannot be a much more important matter than that for your community.

Ms AYRES: Yes, it is very important.

The Hon. DAVID CLARKE: I also invite you to comment about your concerns with respect to that draft bill.

Ms AYRES: Thank you.

The Hon. BRONNIE TAYLOR: I do not have a law degree so this may be more of a comment than a question. I have been listening to everyone speak and I have been hearing the jargon associated with the legalities of this. I am the mother of a child who did photography—portraits of people—for her Higher School Certificate artwork. She asked permission. It was truly wonderful and I do not think she once had someone say, "You can't do this." This is about serious invasions of privacy. Correct me if I am wrong—as I said I do not have a law degree—but I think the comment was made before that those provisions are already in place. I challenge that, because we have heard alarming evidence during this inquiry about serious invasions of people's privacy—terrible situations—and they had no recourse through the legislation that exists.

I acknowledge that you said there were holes in the legislation but surely we can come to some arrangement that would not impinge on your ability to be artistic and to tell your story through photos in the library, and how important that is to the fabric of our society. Art is important, but by the same token we cannot say that we need to protect that side and not listen to all the evidence that we have been receiving. I am interested in your comment about that. Mr Shain, you clearly stated that when you are questioned about taking photos you are able to say no. Mr Shoebridge alluded to the same thing. Surely we can have legislation that protects people whose privacy is being seriously invaded while maintaining integrity in relation to the things you speak about.

Mr AYRES: I will address the last comment first. I am probably part of the 1 per cent or 0.5 per cent of artists in Australia who contribute to discussions on these matters—who come along to these inquiries and

who give evidence at Senate committees about these sorts of issues. I am possibly the wrong person to answer that question because I do understand. Often the biggest problem the artistic community has is the artists, because they do not understand. That is not part of the reason they get up in the morning. They get up in the morning to document society, to create images and to document what has been going on. Let us not get to a situation where we have to turn them into lawyers.

I am not a lawyer, obviously, but I am failing to see what the problem is. There is a lot of knee-jerk reaction. The press release talked about revenge porn, drones and social media. In legislation to fix all of that, let us not throw the baby out with the bathwater and make onerous impositions on the 99.9 per cent of the population—like your daughter and her HSC—who are doing these things legitimately. Why should there be any chilling effect on that?

The Hon. BRONNIE TAYLOR: I do not think anybody wants that chilling effect.

The Hon. LYNDA VOLTZ: Maybe I could put it this way, Mr Shain. If you recall the photo of Lara Bingle that was taken by the footballer you will remember that her face showed she was obviously distressed. That photograph was then published. Do you see any problem with that photograph?

Mr SHAIN: I think I stated at the beginning that there is the act of taking the photo and then the act of using the photograph. They are two completely different problems. I am concerned that if legislation is not crafted really well there will problems with respect to the act of taking the photo, because those photos will not be taken.

The Hon. LYNDA VOLTZ: The Australian Law Reform Commission has stated that a "reasonable expectation of privacy" must be part of the law.

Mr SHAIN: Of course.

The Hon. LYNDA VOLTZ: That would cover that photo. It would not cover kids on a beach, would it?

Mr SHAIN: We had a debacle a couple of years ago when the eastern suburbs local council was trying to regulate against—

The Hon. LYNDA VOLTZ: Let us move away from what councils try to do with their properties and talk about what the Australian Law Reform Commission has said. The ALRC said that there should be a reasonable expectation of privacy, which would cover Lara Bingle standing in her shower. With respect to public interest the ALRC said:

> … the court must be satisfied that the public interest in privacy outweighs any countervailing public interest.

There is a whole raft of elements that the Australian Law Reform Commission has put forward. There is within the legislation it proposes a requirement that if it is in the public interest for something to be published, and when that is not outweighed by privacy, it can be published. It included in that category the recording of public events.

Mr SHAIN: Maybe the lawyers should respond to that, because that is heading into areas that I do not understand.

The Hon. LYNDA VOLTZ: I am talking about a young woman who has had her privacy seriously invaded. I know that you are saying you do not get where the problem is, but for women there is a huge problem with regard to the way they are portrayed, particularly when there is a serious invasion of their privacy and images that they have not consented to—they may be portrayed naked—are then republished by someone.

Mr SHAIN: We are getting into territory that, for me, as a working professional, is of no consequence because it is not something that a professional photographer would get into.

The Hon. LYNDA VOLTZ: I have not been able to grasp how you see a problem in what the Law Reform Commission has put forward. You have said that if you go out the back of Parliament House someone

may say that you cannot take photos. That is a special zone that is covered by specific legislation so you would not be able to.

The Hon. DANIEL MOOKHEY: In your submission to the ALRC you recognised that it is possible to oppose a bill and support aspects of mitigation in the bill. I ask my question in that vein. Has your organisation had extensive involvement with dispute resolution in respect to the issues that you have? Do you think that the inclusion of an alternative resolute mechanism in this bill would make it less onerous for litigants and make it simpler and cheaper for people to participate? Would that be something that you would support?

Ms AYRES: We would support alternative dispute resolutions. I know that we are looking at this from the other side, but we often give advice to clients who have very limited financial means, when they are trying to assert their rights. We appreciate the role of alternative dispute resolution. We also appreciate that low-cost forums are an important consideration for people to be able to access their rights.

The Hon. DANIEL MOOKHEY: Do you think that the courts are the best tribunals to resolve these matters? Would it be preferable to look at the lower cost jurisdictions, such as the NSW Civil and Administrative Tribunal, which is probably not equipped, or structures like the Privacy Commission? They do not require the use of or access to judicial powers. Is that a better way to obtain a quicker resolution to these issues? Or do you think that artists would support having their rights enforced by a court alone?

Ms AYRES: The concern for artists is that unmeritorious claims will not be easy to bring. That would then involve them in an alternative dispute resolution mechanism or a low-cost jurisdiction where they have to defend their right, their freedom of expression. There is a concern about that balancing act: getting the proposed legislation right so that artists do not have to constantly go off and do that.

Mr DAVID SHOEBRIDGE: I want to ensure that I understand your primary concern. Your primary concern is with images taken in public and from a public place.

Ms AYRES: That is the primary concern.

Mr SHAIN: Absolutely.

Mr DAVID SHOEBRIDGE: I will give an example of where your concerns with the draft bill might be real. Let us say that a family are having a close and intimate picnic in the middle of a park. They are sharing a private moment on the rug. They think it is private, although they are in the middle of a park. That is when these issues come into play. If you take a photograph of someone sharing an intimate moment on a picnic rug, even in the middle of a park, you want to make sure that that is not captured by these laws. They might think they have a reasonable expectation to privacy, but they will get caught up in this web. Would that be an example?

Ms AYRES: That is absolutely an example. Photographers and filmmakers are also able to take photographs of private premises from public property. I am not talking about taking invasive photos of someone in the shower. There have been beautiful photos capturing people not necessarily in their homes but in what are essentially private premises. You would not want to lose those as well.

The Hon. DAVID CLARKE: We are concerned about the scenes that are not beautiful that might be caught in a public park.

The Hon. LYNDA VOLTZ: Would you take this question on notice. If there were legislation, in your view, what would need to be in that legislation to satisfy the arts community? What should the legislation say?

Mr DAVID SHOEBRIDGE: That was my earlier question.

Ms AYRES: Yes. It is similar.

CHAIR: The time for questions has expired. You have 21 days to respond to any questions you have taken on notice. The Committee may also forward to you supplementary questions. Thank you very much for coming today.

Mr SHAIN: Thank you.

Ms AYRES: Thank you for the opportunity.

(The witnesses withdrew)

SARAH WALADAN, Manager, Media Policy and Regulatory Affairs, Free TV Australia; and member, Joint Media Organisations group, and

SARAH KRUGER, Head of Legal and Regulatory Affairs, Commercial Radio Australia Limited; and member, Joint Media Organisations group, affirmed and examined:

CHAIR: Welcome. Would you like to make an opening statement?

Ms WALADAN: Yes. Thank you to the Committee for the opportunity to appear today. I appear on behalf of Free TV Australia in my capacity as manager of media policy and regulatory affairs, and, with my colleague Sarah Kruger from Commercial Radio Australia, on behalf of the Joint Media Organisations in our capacity as member representatives.

Free TV is the peak industry body representing Australia's commercial free-to-air broadcasters, including networks Seven, Nine, Ten, Southern Cross and Prime. Commercial Radio Australia is the peak industry body for the commercial radio industry in Australia. The Joint Media Organisations are a coalition of major media companies, including Australian Associated Press, APN News and Media, Astra, Bauer Media, Commercial Radio Australia, Fairfax Media, Free TV, the Media Entertainment and Arts Alliance, News Corp Australia, SBS, the Newspaper Works and the Western Australian News.

Free TV and the Joint Media Organisations do not support a statutory cause of action for serious invasions of privacy. A statutory cause of action is unnecessary. There is no identified gap in the existing privacy law framework and no demonstrated need for an additional privacy action to be introduced. The current framework of Commonwealth and State legislation, common law and regulatory protections is extensive, effective in protecting individuals and is operating well.

From Free TV's perspective, there are strong privacy protections that apply under the Commercial Television Industry Code of Practice. The number of privacy complaints received under those provisions of the code is very low and declining. In 2014 privacy complaints represented around 2 per cent of overall complaints received in that calendar year. Similarly, in commercial radio there has been only one complaint related to privacy since the start of 2014, and it was dismissed by the Australian Communications and Media Authority [ACMA].

While there are no identifiable benefits to be achieved from introducing a statutory cause of action, in our view, our members are concerned that there are a number of serious risks associated with it. A statutory cause of action for serious invasions of privacy would lead to increased and undue complexity and uncertainty of privacy laws, have an unjustified adverse effect on the freedom of the media to seek out and disseminate information of public concern, place an unjustified regulatory and economic burden on the media, including exposure to complex and costly litigation, and act as a disincentive to organisations innovating and fully utilising new communications tools such as social media sites.

These effects are amplified by the current evolving technological and social context, which makes it extremely difficult from a public policy perspective to codify what should constitute a serious invasion of privacy. For the same reasons, Free TV and the Joint Media Organisations do not support any broadening of the scope of breach of confidence remedies for serious invasions of privacy.

CHAIR: Thank you very much. We will commence with questions from the Deputy-Chair.

The Hon. LYNDA VOLTZ: The Law Reform Commission has included in its proposed legislation a defence of fair report of proceedings of public concern. Would you explain why you do not think that is adequate?

Ms WALADAN: We are of the view that, in the context of the current framework, a statutory cause of action is unnecessary. There are already a plethora of State and Commonwealth laws that deal with privacy. They sufficiently cover the issues concerned.

The Hon. LYNDA VOLTZ: Would you give me an example of a New South Wales law?

Ms WALADAN: For example, there is the New South Wales Privacy and Personal Information Protection Act.

The Hon. LYNDA VOLTZ: That covers government agencies, doesn't it?

Ms WALADAN: Yes. There are also surveillance devices laws. There are a range of laws in relation to matters affecting or involving children, including the Children and Young Persons (Care and Protection) Act, for example. There is criminal trespass legislation. There are a number of laws.

The Hon. LYNDA VOLTZ: How does the criminal trespass legislation prohibit someone from using their camera to film your backyard, if they are not on your property?

Ms WALADAN: The point is that there are a number of laws that cover these issues. Whether that law covers that particular circumstance—

The Hon. LYNDA VOLTZ: Here is an example that I used with the previous witnesses. Lara Bingle was photographed in the shower and the photographs were made publicly available. Which New South Wales law covers that?

Ms WALADAN: I would have to look at the surveillance devices legislation to see whether that covers it. That may well cover that type of scenario.

The Hon. LYNDA VOLTZ: We know it was taken on a phone camera.

Ms WALADAN: Why would it not be covered by existing surveillance devices legislation?

Mr DAVID SHOEBRIDGE: The surveillance devices legislation covers recordings of sound; only sound.

Ms WALADAN: Commonwealth laws would also be applicable in that scenario.

Mr DAVID SHOEBRIDGE: The question was about New South Wales laws.

Ms WALADAN: Yes, but there would be Commonwealth and New South Wales laws that are applicable to that particular scenario.

Mr DAVID SHOEBRIDGE: But the question was about New South Wales laws.

The Hon. LYNDA VOLTZ: Ms Kruger, would you like to add to that?

Ms KRUGER: We would question the need for areas to be regulated at both the Federal and State level, given the layers of regulation that our industry is subjected to.

The Hon. LYNDA VOLTZ: Let us take that angle, and you can tell me which Commonwealth law would have prohibited the transmission of those pictures.

Mr DAVID SHOEBRIDGE: Given that there are no gaps in the law, demonstrate it.

Ms WALADAN: I think the surveillance devices legislation at the Commonwealth level would be likely to cover that. I would need to take that question on notice and consider the specific scenario under specific legislation. Our understanding is that the existing surveillance devices legislation—

Mr DAVID SHOEBRIDGE: Is there a Commonwealth surveillance devices Act?

Ms WALADAN: There is not a specific Act, but there is surveillance devices legislation at a Commonwealth level.

The Hon. LYNDA VOLTZ: That covers telecommunications matters, such as phone tapping.

Ms WALADAN: That is right.

Mr DAVID SHOEBRIDGE: This was not phone tapping.

Ms WALADAN: No.

Mr DAVID SHOEBRIDGE: There are State workplace surveillance laws that deal with video, but they are limited to workplaces and they do not cover the field. There is no State law that applies outside workplaces. Tell us about the Federal one.

Ms WALADAN: I am not saying that there are no issues with surveillance devices legislation. If there are issues and specific examples that the existing surveillance devices legislation does not cover then we would say what is required—

Mr DAVID SHOEBRIDGE: The Deputy-Chair has been asking you to answer that. She has given you a specific example.

Ms WALADAN: I would to know more about the specific scenario.

The Hon. LYNDA VOLTZ: Perhaps you could take it on notice, have a look at it and come back to us.

Ms WALADAN: Yes.

The Hon. DANIEL MOOKHEY: I understand your contention that there is legislation that covers the field and provides adequate remedies for any breaches of privacy. I do not want to concentrate on that angle. I want to concentrate on the two codes of practice that you nominate as being adequate to solve these things in addition to those protections. The Commercial Television Industry Code of Practice is, I presume, a voluntary code of conduct engaged in by the major free-to-air television companies. It is not binding, is it?

Ms WALADAN: It is absolutely binding.

The Hon. DANIEL MOOKHEY: The second is the ACMA Privacy Guidelines for Broadcasters. Your contention is that that framework allows for the distinction between public and private conduct, the treatment of publicly available personal information, intrusion upon seclusion and consent in respect of a public figure to be dealt with?

Ms WALADAN: Yes.

The Hon. DANIEL MOOKHEY: Is it your view that free TV and radio cultures encourages them to respect these laws?

Ms WALADAN: Absolutely, and that is demonstrated by the level of complaints.

The Hon. DANIEL MOOKHEY: You say 3 per cent of all complaints you receive are privacy related?

Ms WALADAN: Two per cent I think.

The Hon. DANIEL MOOKHEY: It would be great if you could give a specific case example and explain to me how the conduct of that organisation aligns with the standards. Can we turn to the David Campbell matter that took place in New South Wales a few years ago?

Ms WALADAN: Yes.

The Hon. DANIEL MOOKHEY: The relevant details are that a major free-to-air television in respect to a public figure essentially outed him without his consent and then asserted that that was in the public interest. Do you think the action by that television broadcaster was in line with the code of conduct?

Ms WALADAN: I am not in a position to speak on behalf of a specific network.

The Hon. DANIEL MOOKHEY: I am not asking you to. Do you know the facts of that case study?

Ms WALADAN: Yes, I broadly know the facts.

The Hon. DANIEL MOOKHEY: Do you quibble with the facts of that study?

Ms WALADAN: If you could restate them that would be great.

The Hon. DANIEL MOOKHEY: A senior member of a government had his private conduct essentially broadcast, with an assertion from the broadcaster—I am not suggesting that that assertion was necessarily wrong—that his behaviour was not in the public interest and therefore justified him essentially being revealed to be a gay man against his wishes. Those are the facts. Do you think that that conduct aligns with the standards as put forward by the two codes of conduct and the culture of respect?

Ms WALADAN: My view in relation to that is not relevant.

The Hon. DANIEL MOOKHEY: Is it remedial?

Ms WALADAN: What is in the public interest depends very much on the social context of what is happening and people's views at the relevant time, how that is weighed up and the public nature of the figure. That is what the relevant network, presumably, would have weighed up at the time.

The Hon. DANIEL MOOKHEY: It is the case that the network got to make that decision first. It was not as though it entered into negotiation and went to any other tribunal to make that determination.

Ms WALADAN: As it would be with any court, if there was a statutory cause of action in place the network would still be in a position to make that decision first, and then it would have to go through very lengthy and costly litigation to ultimately get to the point where maybe it is or it is not seen as a breach of privacy.

The Hon. DANIEL MOOKHEY: But the onus would be on the person who was essentially affected by that network choice to go through these procedures to see whether that conduct was valid in the first place. Is that right?

Ms WALADAN: Sorry, I do not follow.

The Hon. DANIEL MOOKHEY: For example, after Mr Campbell, was outed the onus would be on him to pursue a remedy and not the network.

Ms WALADAN: Absolutely, the same as exists now.

The Hon. DANIEL MOOKHEY: I understand it is a general position. What remedies are available under the ACMA process?

Ms WALADAN: There are a number of remedies available that the ACMA can choose. For example, there are financial penalties. Networks can have their television broadcasting licences suspended or cancelled.

The Hon. DANIEL MOOKHEY: Has that ever happened?

Ms WALADAN: It does happen. It is rare because the number of privacy complaints is very low. In relation to whether it has happened to a privacy complaint I would need to go back and have a look at that. Privacy complaints are very low and so as a consequence of that it is rare. But those remedies are absolutely available and that process is free to all complainants and relatively much quicker than a court action. A statutory cause of action would presumably take a lot longer for the relevant complainant to go through. The ACMA process is free, fast and very accessible.

The Hon. DAVID CLARKE: In your submission one reason for opposing statutory cause of action is that it will lead to complexity and uncertainty of privacy laws. There is no evidence of that. The situation is usually a statutory cause will give greater certainty to the law. You are saying it will have completely the opposite effect to what is the normal position.

Ms WALADAN: In the context of: a number of laws covering these issues, overlapping State and Commonwealth laws and additional provisions in the codes of practice, yes that is right because networks and media organisations are then subject to a plethora of laws and they need to then work out what applies and in what circumstances. That then increases the risk for them and therefore impacts on the risks involved with reporting on matters that are in the public interest.

The Hon. DAVID CLARKE: Therefore, we would never have any statutory laws in States because they may conflict with a statute in another jurisdiction? That is not a very strong argument.

Ms WALADAN: No, not necessarily but in the case of privacy there are so many laws that cover various aspects of privacy. Surveillance devices are an example, which even the ALRC pointed to and said they are a bit of a mess. There should be national and State consistency, and we would absolutely agree with that. We think there should be consistency in the approach taken between national laws and State laws in relation to privacy in order for it not to be complex and difficult for people to understand and for media organisations to comply with and implement.

The Hon. DAVID CLARKE: That may be a reason to get consistency in statute law between different jurisdictions but that is not a reason for us to have no statute laws at all on this. The argument in response to your assertion is that we seek to get consistency in the different jurisdictions in Australia. Is that the solution to the problem, to get consistency rather than not to have any statute law at all?

Ms WALADAN: If New South Wales were to implement this, and in that context we have not even heard what is happening at the Federal level, it would be creating a situation where it is potentially inconsistent and it is definitely overlapping and, therefore, more complex.

The Hon. DAVID CLARKE: So we would never have any statute law in anything because it could be overlapping law in another jurisdiction? Another of your arguments against having a statutory cause is that of costly litigation. There is no suggestion or evidence that you can submit that shows that it will be more costly with a statutory cause in these situations. That does not follow at all.

Ms WALADAN: Litigation is by nature lengthy and costly.

The Hon. DAVID CLARKE: Even litigation that is based on common law can be lengthy—

Ms WALADAN: Absolutely but introducing more would subject us to the risk of more complex and costly litigation on top of what is already in place.

The Hon. DAVID CLARKE: Do you accept there can be costly litigation at common law and costly litigation with statute law; therefore we should not have statute law in this area?

Ms WALADAN: No, therefore, we should not create many layers of overlapping laws. I understand your point, yes, absolutely. It is costly either way but then the question arises: Do you then create more overlapping layers and if you do, what for? There has to be some point to it.

The Hon. DAVID CLARKE: The idea for a statutory cause is to get clarity in the law so it would be less costly. Do you agree with that general argument?

Ms WALADAN: In this specific instance, I do not see how it is less costly.

Mr DAVID SHOEBRIDGE: You say that remedies for breach of confidence should be left to develop at common law. That is your submission.

Ms WALADAN: Yes.

Mr DAVID SHOEBRIDGE: You say in your submission, "In this context media organisations are of the view that equitable actions for breach of confidence should be left to be developed at common law on a case-by-case basis and the introduction of legislation is unnecessary." Do you stand by that?

Ms WALADAN: Yes.

Mr DAVID SHOEBRIDGE: Case-by-case development at common law—almost a definition of expensive litigation—will be expensive?

Ms WALADAN: Litigation is expensive whatever way you look at it. I agree with the general point that litigation is expensive and costly. The point we are making is that to create more layers and more opportunities for litigation increases the risk and the burden on media organisations and that should be taken into account.

Mr DAVID SHOEBRIDGE: Do you suggest that the common law developed through equitable actions for breach of confidence, common and law and equity develop remedies under the equitable action for breach of confidence? That is where you think the law should develop, is that right?

Ms WALADAN: That is where courts have indicated that they are willing to develop the law, yes.

Mr DAVID SHOEBRIDGE: As your clients are media organisations, surely they would be greatly troubled by the fact that in that equitable action questions of freedom of expression or public interest do not rate a mention? Surely that is a problem from the perspective of a media organisation? You are inviting the law to develop when we know that the very issues you are telling us about are not even in the mix.

Ms WALADAN: Yes, it is an issue that is not in the mix. However, weighing it up, we are not in favour of introducing an additional layer of privacy regulation.

Mr DAVID SHOEBRIDGE: Surely it would be better for those of us concerned about freedom of expression and public interest, rather than inviting the courts which is what you are doing, to develop this breach of confidence doctrine, to have a High Court authority or determination and to have a whole raft of litigation under this common law which does not have public interest or issues of freedom of expression—to devise a statutory framework that has issues of freedom of expression and freedom of speech at its core? We can do that.

Ms WALADAN: We have grave concerns that a statutory cause of action—I hear your point—would also be very uncertain. For example, questions such as: What is a serious invasion of privacy? Those are the sorts of questions even before we get to any kind of defences or anything like that. If a defence were introduced media organisations would have to go through a whole process before getting to the point where a defence would need to be raised. But that is a separate issue. What is a serious invasion of privacy is a very complex issue in the current social and technological environment. That is a concern for us. The question then becomes whether the law should step in at this point in time when the environment is very dynamic and changing every day. How will it benefit?

The Hon. DAVID CLARKE: The benefit is to clarify the law. There are complexities in all laws, and the law just has to deal with them. But to say that we will not have any statute laws at all because of complexities does not make any sense to be honest.

Ms WALADAN: We are not saying we cannot have any statute laws because of complexity but we are saying you need to really think through what kind of statute laws you introduce. You also need to create clear laws that are consistent nationally and at a State level.

The Hon. DAVID CLARKE: You are saying that because they are complex we should not have them. That is specifically in your submission.

Ms WALADAN: In this particular scenario, yes.

Mr DAVID SHOEBRIDGE: You say there is a concern about the complexity, about what is or is not serious. Just to make a general assertion, the Australian Law Reform Commission has devised a specific proposal, a draft bill, which includes statutory definitions in that regard. Will you take on notice a considered critique of the provisions as to what is a serious breach in the ALRC's draft bill?

Ms WALADAN: Yes.

The Hon. BRONNIE TAYLOR: I refer to page 7 of your submission which relates to existing laws that you think are technological neutral and that we do not need any more. You used the example of a child's

birthday party and posting a video from it. In the last paragraph you say that the current social media environment supports individual choice. But sometimes in social media it is not your choice when somebody posts something that defames you, is unpleasant or is a serious invasion of privacy. I find that difficult to reconcile. Things have moved so quickly and the legislation has stayed the same. You do not agree with that at all.

Ms WALADAN: It supports individual choice in that you can choose how you engage with that. I take your point that sometimes there are increased risks in terms of privacy and dealing with social media. But then we get back to the question of how you regulate that and whether a statutory cause of action is useful in dealing with that type of situation. We would say that that is not the best way to address the situations that this Committee is examining.

The Hon. BRONNIE TAYLOR: There has been a lack of any type of framework or recourse for the average person, and Mr Shoebridge alluded to expensive litigation. That makes it difficult because we seem to keep pushing along this trajectory with no framework about where to stop in terms of serious invasion. My colleagues who heard the evidence may be able to help me. You talk about society's interpretation of privacy and different generations, and how some people may feel a lot more comfortable with a lot more being shared than others. We heard earlier that we assume this generation are more comfortable sharing more, but they are actually seeking greater privacy and confidentiality, particularly in social media.

Ms WALADAN: I think it is individual.

The Hon. BRONNIE TAYLOR: But the evidence and the research indicate that as a generation they want more. Are we assuming that they do not? I think that is a very dangerous assumption.

Ms WALADAN: I agree. I do not think that we can assume across the board that people do not. However, I think there is a greater spectrum. It differs from individual to individual; some are absolute in their response, but others are not. What people across the spectrum consider to be private and not will differ from individual to individual. That is the point. There is now this greater spectrum of views about privacy, which brings us back to how you take that into account in the legal framework and how you best address it.

Mr DAVID SHOEBRIDGE: The Hon. Bronnie Taylor was talking about the evidence that the Committee heard from Dr Henry, Dr Powell and Dr Flynn. Their survey, which is not anecdotal, thoroughly reviewed expectations in respect of privacy across the country. It found exactly what the honourable member said; that is, that young people are every bit as concerned. In fact, they are more concerned about their privacy as a class of people than middle-aged and older people. It is a real concern and they want protection.

The Hon. BRONNIE TAYLOR: Do we need to be very cautious in this situation? It is like a child; if you keep letting a child do the same thing they will keep doing it and think it is okay unless there is some type of framework to tell them it is not okay. Have we got to the point where we have started to see these breaches as acceptable when they are doing some serious damage?

Ms WALADAN: In terms of—

The Hon. BRONNIE TAYLOR: You say that the legislation does not have to evolve because technology has evolved; it is technology neutral and privacy is subjective.

Ms WALADAN: The existing laws are drafted in a way that is technology neutral. So, regardless of the platform on or media in which the relevant privacy breach has occurred, those laws should be able to deal with it. For example, the code of practice in particular is not drafted in a specific way. That is really the point. We would say that technology-neutral laws are the best way to deal with these things. We should have laws that stand the test of time rather than laws targeted at a specific scenario that might change.

The Hon. DANIEL MOOKHEY: I want to explore the concept of the burden on media organisations that you say a statutory cause of action will impose comparative to the existing burden on media organisations. In the appendix to your submission you nominate six forms of torts that you believe are relevant and you cite quite a few aspects of legislation. In general your contention is that that must impose some element of burden on media organisations as it currently stands.

Ms WALADAN: Absolutely.

The Hon. DANIEL MOOKHEY: And your view is that that burden will be dramatically increased should an additional piece of law—

Ms WALADAN: We are not saying "dramatically increased". We are saying this will increase—

The Hon. DANIEL MOOKHEY: Can you take the Committee through that?

Ms WALADAN: It will be another layer of privacy law and there will be a cumulative effect of overlapping laws that we will need to consider in turn and respond to. For example, if there is a news story that is in the public interest, but there are privacy laws and risks associated with it, and there is another news story that involves no risk, cumulative and additional layers of privacy laws mean there is a disincentive in going with the news story that is a higher risk in terms of breaching the law. That is really the point.

The Hon. DANIEL MOOKHEY: I understand the point. We asked earlier witnesses a question about jurisdictions. Insofar as there is a jurisdiction about privacy in respect of these existing torts and it is fractured over these torts—that is, different teachings from the courts on different torts—do you think there is an argument to say that that would be greatly simplified if, as the *Australian Law Reform Commission [*ALRC] recommends, we essentially repeal those torts, or at least insofar as they affect privacy, and replace them with one tort? Do you think that would provide greater simplicity than the existing framework? You assert that it is cumulative or additional, whereas the ALRC actually says there should be one in place of the other.

Mr DAVID SHOEBRIDGE: I do not think they talk about a statutory repeal of the equitable—

The Hon. DANIEL MOOKHEY: Yes, they do.

Ms WALADAN: I am not aware.

CHAIR: You can take questions on notice.

Ms WALADAN: I will.

The Hon. DANIEL MOOKHEY: Putting aside the ALRC's views as contentious, do you think that it would be better to replace the existing torts with one form of tort?

Ms WALADAN: I am not sure how you would do that.

The Hon. DANIEL MOOKHEY: It is not hard.

Ms WALADAN: In terms of the common law, they are there and the courts could still—

The Hon. DANIEL MOOKHEY: We have abolished torts before; we do it quite often.

Ms WALADAN: I will take that question on notice.

The Hon. DANIEL MOOKHEY: Your view about the burden is that it would inhibit, for want of a better term or expression, news value. Is that the magnitude of the burden, or are there other things that should be considered? Do you think it should have a cost impact additional to what you have now?

Ms WALADAN: The cumulative effect of additional laws will mean there is some, and it is hard to—

The Hon. DANIEL MOOKHEY: Is that the only one?

Ms WALADAN: No. There is the one that I mentioned plus potentially additional resources in terms of training and ensuring that people are across the law and any new procedures that we would need to put in place. If an action is brought under a new statutory cause of action then obviously there will be associated costs. There would be a number of aspects. It is a cumulative effect. In terms of working out what degree exactly, that is a separate issue. The cumulative effect would be that all those areas would be impacted.

Mr DAVID SHOEBRIDGE: Almost none of your clients will find themselves as a defendant in an equitable cause of action for a breach of confidence because the nature of your organisation is such that you will not have a relationship of confidence with whoever's privacy has been breached. Do you agree with that?

Ms WALADAN: Can you say that again?

Mr DAVID SHOEBRIDGE: Under the current patchwork law it is highly unlikely that any of your clients will find themselves as defendants in an equitable breach of action because the nature of your organisation is such that you will not have a relationship of confidence with the people whose privacy you are breaching. You are comfortable with the current law because you will not be the subject of it.

Ms WALADAN: I am not sure that is the case.

Mr DAVID SHOEBRIDGE: Are there any cases in which any of your members have been the subject of an equitable breach of confidence?

Ms WALADAN: Not that I am aware of, but I will look at that.

Mr DAVID SHOEBRIDGE: It is no wonder you are comfortable with the current law—that part of the law does not apply to you.

Ms WALADAN: We are not really comfortable with the current law. Rather, we are comfortable with it, but it already provides extensive privacy protections and we see that there is scope to make laws more consistent and national. We are comfortable to a degree.

Mr DAVID SHOEBRIDGE: What causes of action have your members been the subject of where an individual has successfully asserted a privacy right and received damages?

Ms WALADAN: We are here today representing a number of members.

Mr DAVID SHOEBRIDGE: Tell me one that comes to mind.

Ms WALADAN: I would need to check.

Mr DAVID SHOEBRIDGE: You must have some that come to mind, if there are any. Just give me one.

CHAIR: The witness has said that she is taking the question on notice.

Ms WALADAN: Yes.

Mr DAVID SHOEBRIDGE: I would suggest that there are bugger all. That would be a good summary, would it not?

Ms WALADAN: I would to need to look at it. As I said, we represent a number of members. I am not sure there are bugger all. The code processes are free and easily accessible, and for that reason people tend to go down that path.

Mr DAVID SHOEBRIDGE: I thought you said no-one uses the code of privacy. It is 1.8 per cent of claimants in one year and 3 per cent in another year.

Ms WALADAN: They are very low, but people do use them. The process is free and very easily accessible. It is not that it is not used at all.

Mr DAVID SHOEBRIDGE: It sounds successful from your side of the process.

The Hon. LYNDA VOLTZ: How many people have been successful in these processes?

Ms WALADAN: Through the years there have been a number.

The Hon. LYNDA VOLTZ: Can you take the question on notice and provide the Committee with the number?

Ms WALADAN: I can take the numbers on notice. However, as I said, I think there was one successful case last financial year. The numbers are low.

The Hon. LYNDA VOLTZ: When you are looking that, can you also point out which ones were undertaken with the intention to inflict emotional distress? Can you provide the Committee with instances where that invasion was committed intentionally and recklessly?

Ms WALADAN: Okay.

Mr DAVID SHOEBRIDGE: Your organisation represents a very clear public interest and it has an important role in terms of freedom of expression and holding people to account, particularly politicians and other people in positions of authority. I do not think anyone would debate that there is a public interest, and a very powerful one. However, is the law right at the moment? Do individual citizens who have their privacy grossly breached, potentially by your members, have a viable remedy? It seems on the figures that you have provided and on any reasonable review of the case law that there is no remedy or viable remedy. That is what this Committee is examining.

Ms WALADAN: But is statutory cause of action a viable remedy for those people? Is it also a viable remedy in terms of the scenarios that the Committee is examining? They are the other questions, and we would say that it does not sound like it.

Mr DAVID SHOEBRIDGE: But it is more viable than no remedy.

Ms WALADAN: It is for those plaintiffs who have enough money to pursue costly and lengthy litigation, which is very few.

The Hon. LYNDA VOLTZ: It may be that your organisations are not offending in these kinds of instances.

Ms WALADAN: All of the organisations we are representing take their privacy obligations very seriously.

The Hon. LYNDA VOLTZ: That is one of the points made by the Hon. David Clarke. You talked about who is likely to offend. When we make laws about alcohol use in pubs and who goes into them, drugs and whatever, we are not making them for the overwhelming majority; we are making them for the minority.

Ms WALADAN: Absolutely. One of the other points is, yes, we take our obligations very seriously and I think by and large we have a very good track record in this regard. However, the other aspect of it is that regardless of that, cumulative layers will act as a disincentive to disseminate information for the reasons I gave earlier. That is an issue of itself. As a matter of principle overlapping complex inconsistent laws at a national and State level are a problem as an issue itself. It is a disincentive to publish information that is in the public interest. That is really the problem.

Mr DAVID SHOEBRIDGE: We should wait for the Commonwealth?

Ms WALADAN: At least. Yes, that would be our submission.

The Hon. LYNDA VOLTZ: I do not understand. If legislation is drafted by the Law Reform Commission that says "defence of fair report of proceedings of public concern"—which is what it says should be in the legislation—why is that being raised as an issue when specifically that is a recommendation it has put forward?

Ms WALADAN: That is a separate issue in our position in relation to the Australian Law Reform Commission [ALRC] proposal. But even if there is a defence there would still be a cause of action and broadcasters or media organisations would be required to go through the whole process. You would still be subject to costly and lengthy litigation. The fact that there is a defence at the end of it is helpful, but it does not address the problem of acting as a massive disincentive.

CHAIR: Time for questions has expired. Any questions that you have taken on notice will be provided to you in writing.

Ms WALADAN: Great.

CHAIR: You will have 21 days to respond and if there are supplementary questions from the Committee they will be sent to you as well. Thank you for appearing today.

(The witnesses withdrew)

(Short adjournment)

NORMANN WITZLEB, Associate Professor, Faculty of Law, Monash University, affirmed and examined:

CHAIR: Dr Witzleb, would you like to make an opening statement?

Dr WITZLEB: Yes, I would. Let me begin by thanking the Committee for inviting me to give evidence. The protection of privacy is an area of real community concern and it is good to see that the Committee has taken on the difficult task of inquiring into this area. In preparation for today I have read the transcript of the inquiry's first hearing on 30 October. It seems to me that five points came out quite strongly in the evidence you received in that hearing and all of those points I endorse.

First, there was a consensus that current privacy protections in Australia are inadequate. This echoes the consistent findings of the various Law Reform Commission reports over the last 10 years. Witnesses also agreed that in light of the specific legal context in Australia the introduction of a statutory cause of action is the appropriate way forward to close existing gaps. A statutory privacy tort would not only be able to provide more comprehensive protection than is currently available, it will also have an important function in standard setting and in clarifying the law. It would clearly communicate what is acceptable and unacceptable behaviour in relation to other people's personal information. It will provide useful and much needed deterrence against privacy invasions that are currently outside the law.

Secondly, the right time for introducing a statutory privacy tort is now. While there is no doubt that a nationally consistent approach would be ideal, the political realities are that under the current Federal Government the Commonwealth is unlikely to act. New South Wales could and should take the initiative now. It has been a leader in legislation for improved privacy protection in the past and it may well need to be the leader on this occasion. If New South Wales was the first mover it could provide the necessary impetus for further action in the other jurisdictions either through a nationally coordinated approach or through Federal action at a later date.

Thirdly, a privacy tort is the missing capstone of privacy regulation because it would give private citizens better control over their information and provide civil redress for breaches of privacy. A privacy tort would not replace existing law but complement the current range of protective mechanisms such as self-regulation by the media industry; other civil actions in tort, equity and contract law; the criminal law for particular insidious invasions of privacy; as well as, Federal and State data protection frameworks enforced by the Privacy Commissioner.

Fourthly, it is important that improved protections are not a privilege of the wealthy but accessible to all members of the community. Access to justice requires careful consideration of the complaints mechanisms and procedures. The Committee heard suggestions that the Privacy Commissioner should be given powers to investigate and determine complaints and the NSW Civil and Administrative Tribunal could be given jurisdiction to hear privacy actions. Both of those avenues would provide a low-cost alternative to court proceedings.

Fifthly, the proposal for a statutory privacy tort made by the Australian Law Reform Commission LRC in its report 123 should be the starting point for legislative action in New South Wales. The LRC made its recommendations after careful consideration of the proposal made in preceding reports at State and Commonwealth level and had the benefit of extensive community input. As you know I submit that in some respects the tort is probably formulated unduly narrowly. At the same time I agree with the views put forward by the other witnesses, that if faced with the choice between the LRC tort and no tort I would not hesitate to recommend the introduction of the LRC tort.

To conclude, I would lend my support to all the five points I identified above: better protection of privacy is needed and it is needed now; a statutory privacy tort is the missing capstone of privacy protection; the protection provided by the tort needs to be accessible to persons of limited financial means; and the LRC recommendations for the privacy tort are the most useful templet for designing the cause of action. I encourage the Committee to recommend the introduction of a statutory privacy tort.

The Hon. DAVID CLARKE: Dr Witzleb, you assert that the Law Reform Commission's proposal for a statutory privacy tort is too narrow. Could you give us some examples of the type of serious invasion of privacy that might not be protected under its proposal?

Dr WITZLEB: There are two points I made in my submission where I think the proposal is too narrow. One relates to the limitation that the invasion needs to be intentional or reckless and I think that a negligent standard would be more appropriate. I pointed out in my submission that there are cases where privacy invasions have been committed negligently but they still have very serious consequences and people who would be the victim of those privacy invasions would be without redress if the invasion depended on the defendant having acted with intention or recklessness.

The Hon. DAVID CLARKE: If they were acted upon are there any other areas that are not addressed?

Dr WITZLEB: Yes, two points that are somewhat less significant. The LRC recommendation is that there should be limitation to serious invasions of privacy. I had a suggestion for clarification more than for expansion. I think that limiting it to "serious" invasion of privacy has the potential of—clarifying what that means—putting the bar too high. The recommendation of the LRC was for a flexible process. It needs to be a serious invasion of privacy but they did not define what "serious" means. They identified certain factors going to seriousness, which I think is an acceptable way of designing the tort. But experience in other jurisdictions shows that you do not really need the seriousness threshold if all you want to do is exclude trivial invasions of privacy. The courts are quite adept in weeding out trivial invasions of privacy without there being a statutory limitation that an invasion must be serious.

The Hon. DAVID CLARKE: There was a second matter that you wanted to mention?

Dr WITZLEB: Yes. What the LRC does is basically say, "We want to legislate for two particular forms of privacy invasion, which are intrusion into seclusion and disclosure of private information." They are the two most common forms of privacy invasions but there are others that can also occur. The report, I believe, does not make it quite clear what the consequence of the cause of action would be in relation to other forms of privacy invasion.

The Hon. LYNDA VOLTZ: Going back to your example where you are talking about the intentional infliction of emotional distress and I refer to *Jane Doe v Australian Broadcasting Commission & Others*, which is also covered by the Judicial Proceedings Reports Act. Fundamental to that case is the prohibition on publishing the name of people who have been the victims of sexual assault.

Dr WITZLEB: That is right.

The Hon. LYNDA VOLTZ: I am wondering why. If there was a fault it was not with that piece of legislation that maybe needed to be tightened as opposed to broadening out the intentional infliction of emotional distress. "Recklessly" or "intentionally" are the two Law Reform Commission criteria.

Dr WITZLEB: The prohibition on publishing the names of victims of sexual assault is a criminal prohibition.

The Hon. LYNDA VOLTZ: That is right.

Dr WITZLEB: The person whose name has been published does not necessarily have civil redress to recover damages for the harm that they have suffered as a result.

The Hon. LYNDA VOLTZ: I get that. Currently that is covered by legislation.

Dr WITZLEB: Only as far as the criminal law is concerned.

The Hon. LYNDA VOLTZ: Yes. The intentional infliction of emotional distress currently is not covered by any legislation. It is about trying to deal with an area that is not currently covered.

Dr WITZLEB: That is right.

The Hon. LYNDA VOLTZ: Your concern was the ability under the criminal code for those people where there is a specific criminal prosecutorial element?

Dr WITZLEB: No. I should clarify. I merely refer to that as an example of a case where someone was the victim of a negligent invasion of privacy. The ABC named a person as the victim of a marital rape by

identifying the name of the offender, which made it clear who the person concerned was, and in another report she was actually named as the rape victim. That was prohibited by criminal law but it did not really help the person concerned once it had happened. That is what you need a damages claim for and that is what a statutory privacy tort would do.

Mr DAVID SHOEBRIDGE: The expansion is from "intention and reckless" to "negligent". A number of people said it would be a rational area to expand the tort into negligence. Part of the concern from the Law Reform Commission was that if you expand it into negligence then people might be caught up by accidently pressing "reply all" on an email or sharing something on Facebook and you potentially greatly broaden the scope of the tort. Is there a way of narrowing it so you pick up the big data breaches but not the incidentals?

Dr WITZLEB: The cause of action has some limitations built in because it is based on a balancing of competing interests. The privacy invasion is only ever actionable if other interests are not outweighing the plaintiff's privacy interests. That is the biggest limitation and the biggest control mechanism. In terms of accidentally pressing a button, if that is something that a reasonable person would not have done in the circumstances then it would amount to negligence. The question is whether it would be worth suing someone for negligence if the harm that has been caused is that there were unintended recipients.

Mr DAVID SHOEBRIDGE: The other question is: Do we want to be opening up that area of human activity for litigation or do we want to say what we are really concerned about in relation to negligence is someone like Ashley Madison or some corporation that is profiting from the gathering of data and accessing people's private material? Do we want to say that those for-profit corporations that are doing it for a business, should be subject to negligence claims because they are going to have the resources and capacity to put in place some protective measures? That is the big problem and that is where we should focus the remedy.

Dr WITZLEB: Yes, it is possible to differentiate depending on who the data controller is. The Act is already doing that at the Federal level because it has got an exemption for individuals and for small business operators.

Mr DAVID SHOEBRIDGE: That is what I am asking you about. If we were going to put in any negligence provision, would one way of making the balancing right in protecting privacy and not exposing people of limited resources to actions be to have that kind of exemption for the negligence cause of action?

Dr WITZLEB: It would but of course if you have a limitation of that kind then you will always have problems of properly defining that limit.

Mr DAVID SHOEBRIDGE: There are always the borderlines, are there not?

Dr WITZLEB: The small business exemption, for example, has been criticised in the earlier report of the Australian Law Reform Commission as basically being too wide and undermining the objectives of the Act and they recommended its abolition.

The Hon. DAVID CLARKE: But it is worthwhile still defining it to protect the possibly millions of small innocent people; it is worthwhile the effort going into that to try to define it, even though it is difficult?

Dr WITZLEB: Yes. The question is how you would want to define it. If you say individuals would never be liable if they negligently breach another person's privacy then you would also exclude that in a zone where perhaps they have caused enormous amounts of harm to particular persons.

Mr DAVID SHOEBRIDGE: Of course, this is always a balancing point. One thing is to get a broadly publicly acceptable set of legislative principles that we can legislate for. One thing you alluded to at the beginning is that we do not need another report; we do not need another affirmation that people's privacy rights should be protected. We need some laws, is that not really the point here?

Dr WITZLEB: I agree.

The Hon. DANIEL MOOKHEY: To broaden out this tort so that it covers negligent conduct, are you putting forward that view because you have made an assessment of the existing tort of negligence and found it to be inadequate? In respect of the 10,000 asylum seekers published inadvertently on the website of the Australian Department of Immigration and Border Protection, they could sue for negligence.

Dr WITZLEB: They probably could not currently sue for negligence because if you sue under the tort of negligence you have to have suffered a kind of harm that allows you to sue for negligence. If the only harm that they suffered is emotional distress, a negligence action would not be available.

The Hon. DANIEL MOOKHEY: In your submission one aspect where you depart from the ALRC is that you think we should be relaxing the damage requirement in respect of this tort?

Dr WITZLEB: No. There is no requirement to establish damage under the ALRC report.

The Hon. DANIEL MOOKHEY: Sorry, I may have got that wrong.

Dr WITZLEB: I think that is correct; that is the view across the board. I think there is consensus on that. I am not actually in disagreement with the ALRC.

The Hon. DANIEL MOOKHEY: Sorry, I may have got that wrong.

Mr DAVID SHOEBRIDGE: It is primarily because often the damage people have is shame and emotional distress but it does not get to the point where they have a psychological injury, which means that the current torts are not available to them?

Dr WITZLEB: That is why the current tort of negligence is not available.

The Hon. LYNDA VOLTZ: Getting back to serious invasion, I understand what you are saying about an invasion of privacy and allowing some judicial discretion in that area but a serious invasion also gives judicial direction to the type of invasion and allows judicial discretion, would you not agree, given that there is no particular definition that the Law Reform Commission has put forward. For example, an invasion of my privacy as a member of Parliament is not the same as an invasion of the privacy of a 17-year-old girl who is quite young and would get very distressed about being picked to pieces?

Dr WITZLEB: That is right. My submission is on the basis of the evidence that we have from other jurisdictions and other jurisdictions generally do not have a seriousness requirement.

The Hon. LYNDA VOLTZ: Given that there is no hard and fast definition, if I took to court something as a member of Parliament that applied also to a 17-year-old girl, a judge may think my case was frivolous but might consider her case as serious because I am in the public domain.

Dr WITZLEB: I understand. That is actually another reason why I think the seriousness requirement is a tricky one because you can really only say whether an invasion was serious or not if you have looked at all the evidence—what motivated the defendant, what was the conduct, how many people were hurt and what were the consequences for the victim, which is really only something that you can say at the very end because the whole tort is based on a balancing exercise; whether an invasion was serious or not is something that you can really only say after you have looked at both sides of the story. The idea to use it as a filter does not quite work like that because a filter should apply at the beginning and should not let certain invasions go to court in the first place but your example shows the difficulty with that because it may be that some people are more robust in their responses.

The Hon. DANIEL MOOKHEY: Your evidence is that it should be a factor to determine the magnitude of the breach but not restrict the jurisdiction itself?

Dr WITZLEB: Yes, that is the point that I am making.

The Hon. BRONNIE TAYLOR: Following on the questions of the Hon. Lynda Voltz about serious conduct, we heard evidence from the Arts Law Centre of Australia. Its biggest concern was about the seriousness test—whether that was more subjective and what impact it might have on the ability and creativity of photographers taking photographs. This legislation would impede their ability to do that. Could you give some clarification as to seriousness as opposed to their evidence? I realise you did not hear their evidence but they said it would be a serious imposition on them.

Dr WITZLEB: I can only say that the cause of action is based on balancing competing interests and the interests of people in expressing themselves through artistic means; I assume that was what they were concerned about. That is something that would be protected in the cause of action. You do not really need to move the threshold up to ensure that protection. It is built into the cause of action already because there is a balancing.

Mr DAVID SHOEBRIDGE: You say that if there is going to be a seriousness test, the Australian Law Reform Commission's formulation is the best working model around—

Dr WITZLEB: Yes.

Mr DAVID SHOEBRIDGE: —because it has an objective view of the plaintiff?

Dr WITZLEB: That is right.

Mr DAVID SHOEBRIDGE: And it interrogates the motives of the defendant?

Dr WITZLEB: That is right.

Mr DAVID SHOEBRIDGE: And that is the way you do it?

Dr WITZLEB: I think those two are very good markers of seriousness plus I think it is "inter alia", which means the court can look at other factors of seriousness as well. I think it is certainly better than what we see in some overseas jurisdictions that focus on the offensiveness of conduct, which is focusing too much on the emotional impact that something may have or may not have had.

Mr DAVID SHOEBRIDGE: And looking at the subjective impact on the individual plaintiff that almost certainly would be a recipe for disaster, would it not, because it would be so uncertain?

Dr WITZLEB: Yes. What you would like to achieve with that limitation you would give away again with having a bad standard by which to judge it. I think the ALRC got the right formulation because they refer to offence—

Mr DAVID SHOEBRIDGE: I think these words are to be found on page 14 of your submission "the degree of any offence, distress or harm to dignity that the invasion of privacy was likely to cause to a person of ordinary sensibilities in the position of the plaintiff"?

Dr WITZLEB: If the Committee was minded to use the threshold, I think the one that has been formulated by the ALRC would be the most welcome one.

Mr DAVID SHOEBRIDGE: You are a professor of law. How long have you been looking at the issue of privacy?

Dr WITZLEB: I have been looking at that for 15 years or more.

Mr DAVID SHOEBRIDGE: There have been two reports from the Australian Law Reform Commission?

Dr WITZLEB: Yes.

Mr DAVID SHOEBRIDGE: There has been one report from the New South Wales Law Reform Commission and there has been another report from the Victorian Law Reform Commission over the past 15 years, is that right?

Dr WITZLEB: Yes, that is right.

Mr DAVID SHOEBRIDGE: How would you describe your subjective response to the lack of legislative action, given all of that?

Dr WITZLEB: It is frustrating and it is disheartening to an extent. I am pleased that you have taken the matter up because I understand it is also hard for parliaments to enact privacy laws because you have the media breathing down your necks basically because they are opposed in principle to any form of change in that area so you have to weather the resistance of the media. I only heard the last little bit of the evidence before the morning tea adjournment but sometimes the media can be self-interested in their reports and often allegations are levelled against politicians that take up the cause of privacy that they are self-interested; that you are basically trying to protect yourselves from criticism, which is not what I heard this morning thankfully; but sometimes that comes up as well.

Mr DAVID SHOEBRIDGE: So on the whole there have been a lot of reports?

Dr WITZLEB: Yes.

Mr DAVID SHOEBRIDGE: They are all of one mind?

Dr WITZLEB: Yes.

Mr DAVID SHOEBRIDGE: They all say we should do something?

Dr WITZLEB: That is correct.

Mr DAVID SHOEBRIDGE: You would be, I assume, urging this Committee to just do it?

Dr WITZLEB: Yes.

The Hon. DANIEL MOOKHEY: An area where you depart from the ALRC report is in respect to false light claims or misappropriation claims in which the ALRC makes the point that they are admissible under other torts. Your point is that would suffer from all the other problems that exist if that were the case and you should include them in this one as well?

Dr WITZLEB: Yes, basically the New South Wales Law Reform Commission, when they reported in 2010, had a broad cause of action. They simply said if someone invades someone else's privacy where the invasion is not outweighed by other public interest, someone has a claim.

The Hon. DANIEL MOOKHEY: I accept that in respect to the false light tort but in respect of misappropriation, I guess the distinction generally between misappropriation and privacy is that misappropriation—and in fact the example you cite bears this out—tends to have a commercial aspect as well?

Dr WITZLEB: That is right.

The Hon. DANIEL MOOKHEY: Quite seriously often it is the case of misappropriation that is brought with a commercial motivation. Do you think if you were to essentially merge the two or at least have the same cause of action that you would be creating quite a bit of confusion? In order for each to be treated according to its own requirements do you think there should be some distinction?

Dr WITZLEB: Yes. I do not think it would cause confusion; you would think it would broaden the cause of action. I think what happens at the moment the ALRC proposal might cause a little bit of confusion because they say, "We do not want to legislate for that but we do not want to rule it out either". My submission was to simply say we are not ruling out that other forms of privacy invasion such as misappropriation or false light are actionable provided they fall within the tort. The remedies that are available under the ALRC tort already suggest that they going to the commercial area because one of the remedies available is an account of profit. An account of profit requires the defendant to give up any profit that they have made and that is usually only when they have a commercial gain as a result of a privacy invasion.

The Hon. DANIEL MOOKHEY: I understand that the account of profit remedy would capture the commercial gain element but if we were to design a tort in accordance with the recommendations we would not be including a requirement for there to be economic loss as a form of damage. Do you not think that perhaps a misappropriation tort requires an element of essentially commercial loss to be considered as a damage factor as opposed to an account for profit in that remedy?

Dr WITZLEB: No. Commercial appropriation usually recalls gain to the defendant. You basically take something that is not yours to take because you failed to ask and get a licence or other form of permission and you know that personal attribute that you use is someone's name or likeness and use it for your advertising or to promote your products. That may cause economic loss if you could have charged for giving the permission but that is not necessarily always the case. Someone who is a celebrity will usually be able to charge something for use of their name or likeness, but someone who is just in the public spotlight because something happened to them and their name or likeness is used would not necessarily be in a position to commercialise that personally.

Mr DAVID SHOEBRIDGE: I forget his name, but there was an Australian ice skater who was coming in fourth and then—

The Hon. BRONNIE TAYLOR: Doing a Bradbury.

Mr DAVID SHOEBRIDGE: —doing a Steve Bradbury. That in some ways has elements of the false light tort to it. Are you suggesting that the privacy laws should prevent the development of that kind of moniker—doing a Bradbury?

Dr WITZLEB: I am not familiar with that.

Mr DAVID SHOEBRIDGE: He was coming fourth and the first three ice skaters all crashed and then—

The Hon. LYNDA VOLTZ: He was actually coming last.

Mr DAVID SHOEBRIDGE: He was coming last and then more by good luck than design—although I am sure he is an extremely competent ice skater as he was in the final of the Olympics—everybody else fell over and he came through and won. Winning in those circumstances is called "doing a Steve Bradbury". We would not want privacy laws to prevent the development of that kind of social development, would we?

Dr WITZLEB: No, and it is the same again. You would be able to do that because there is a public interest to coin a new phrase if you think that is what is required.

Mr DAVID SHOEBRIDGE: You might think there is a public interest—I am sorry to use a colloquial phrase—taking the piss out of Harris Faulkner, a Fox journalist, as a hamster.

Dr WITZLEB: If there is then she does not have a claim—that is the essence of a privacy action. You always need to look at both sides of the story.

The Hon. LYNDA VOLTZ: Political satire is a good place. At one stage there were some arguments about Max Gillies and he always got around it by the public interest and a right to freedom of speech in political debate.

Dr WITZLEB: The law is familiar with that problem from defamation already. In defamation we have public interest factors.

The Hon. LYNDA VOLTZ: The Andrew Theophanous case allows public debate, I think.

Mr DAVID SHOEBRIDGE: Looking forward, if New South Wales were to legislate and come up with applying mutatis mutandis the Australian Law Reform Commission's bill in New South Wales, would there be a risk of us becoming a honeypot jurisdiction insofar as being flooded by claims from the rest of the country? If so, is that a problem?

Dr WITZLEB: You would need to think carefully about questions of forum and of choice of law, which is something that the ALRC did not need to spend a lot of time on because they preferred a Federal course of action so there would have been no interstate conflict. If New South Wales went ahead there would be the potential as New South Wales law would be different from the law in other jurisdictions.

Mr DAVID SHOEBRIDGE: You are an associate professor of law and have looked at it for 15 years. What should we do in order to address that?

Dr WITZLEB: You need to define the jurisdictional questions including the choice of law question. If you say that the cause of action is a tort then there are rules in place that say in what circumstances a tort committed in one jurisdiction is actionable in another jurisdiction and which laws apply.

Mr DAVID SHOEBRIDGE: If something is on social media and published on the internet—two individuals in Tasmania have a dispute that goes of Facebook and is downloaded in Sydney.

Dr WITZLEB: That is where it becomes difficult. You have a model in the Defamation Act—there is a provision in the Defamation Act on the choice of law. You would need to decide on whether you want to enable residents of New South Wales to sue for conduct that has an impact on them even if the uploading occurred in Tasmania.

Mr DAVID SHOEBRIDGE: Please give this some attention on notice and provide us with some considered thoughts. It would be really helpful.

Dr WITZLEB: I can. It is a complex matter.

The Hon. DAVID CLARKE: It is complex but important.

The Hon. LYNDA VOLTZ: Perhaps you could look at extraterritorial legislation, such as the surrogacy laws.

Dr WITZLEB: The surrogacy laws are about a different matter because they are about the reverse. They are about when an offence has been committed in New South Wales for something that has occurred outside. In the privacy actions it is more likely that something has occurred outside New South Wales and residents of New South Wales say they want to sue in New South Wales.

Mr DAVID SHOEBRIDGE: If you could think about how we could work out the issue of limiting the scope that would be good. It is not easy.

Dr WITZLEB: Yes, I will take it on notice.

The Hon. LYNDA VOLTZ: It should not be about only the victim being a resident of New South Wales; it should be about the offender being a resident of New South Wales.

Dr WITZLEB: That could be as well. If the defendant is a resident of New South Wales and acted here then that is usually a sufficient basis for choice of law. The rule for choice of law when it comes to tort is place of the commission of the tort. You apply the law of the place where the wrong has been committed. That is easy if you spy over someone's fence in Sydney, but it is hard when it is an internet publication.

The Hon. DANIEL MOOKHEY: I turn to interlocutory relief, the extent to which interlocutory injunctions and other forms of relief are available. Do you think in respect of privacy applications for that form of relief, there needs to be specific directions from the Parliament as to how that should be handled which are different from the current balance of convenience tests? Should there be listing factors or nominating other things to be considered in interlocutory stages or is the current jurisprudence about how interlocutory relief is granted adequate to deal with privacy?

Dr WITZLEB: It may be useful to consider whether there should be more specific direction given because there are different models that courts could be tempted to draw on. They could draw on defamation law. It is quite hard to get an interlocutory injunction in a defamation action and the court may be tempted to say it is perhaps like a defamation action, which I doubt and I have written about that. Or they could look at the law in other jurisdictions—for example the law in the UK has very developed jurisprudence on when you can get an interlocutory injunction. Those two potential sources for inspiration are not in sync and that means a court would have to decide which inspiration to follow.

The Hon. DANIEL MOOKHEY: I understand you have helpfully included an article you published that covers off on this but if you are able to take on notice any specific recommendations as to how interlocutory aspects should be designed that would be most welcome.

Dr WITZLEB: I am happy to do that.

Mr DAVID SHOEBRIDGE: One of the real concerns is ensuring it does not become a rich person's remedy. A couple of issues have been bounced around and you probably saw that in the last hearing's evidence. One was empowering and resourcing the Privacy Commission and the other was an administrative tribunal like the NSW Civil and Administrative Tribunal having some form of jurisdiction to deal with it. What do you think of either or both of those?

Dr WITZLEB: I think both of those sound attractive. Because I am not from New South Wales I am not that familiar with what you—

Mr DAVID SHOEBRIDGE: When I say "NCAT" think VCAT.

Dr WITZLEB: I was a bit surprised about the evidence you received because they already have jurisdiction in relation to civil matters and I think some people said it was only in relation to public authorities, which I think is not quite correct. The NSW Civil and Administrative Tribunal would be a good place to go and likewise the Privacy Commissioner, but you probably would need to allow for a range of procedures depending on the complexity of the matter and the risk appetite of the plaintiff—whether they are willing to bear the costs. One of the advantages of legal proceedings is you refine the law in them. A decision in the Supreme Court has much more value as a signal to others.

The Hon. DANIEL MOOKHEY: On the question of range, do you think that range should be organised in some form of escalation hierarchy?

Dr WITZLEB: I am not sure whether you need to require someone to go to the tribunal before they can go somewhere else but this is not my area of specific expertise.

Mr DAVID SHOEBRIDGE: Having the range of different options, would a purely administrative referral to the Privacy Commissioner for an inquiry to make finding conclusions be part of that?

Dr WITZLEB: I am not sure. In some cases you may want to go straight to the court. If the issue is one of urgency and you are asked to go first to the commission when you know someone is about to publish something and you are caught up in an administrative process, it might not work.

Mr DAVID SHOEBRIDGE: But a good model would probably have all of them: a purely administrative process, an administrative tribunal as well as the ability to go to a court of competent jurisdiction.

Dr WITZLEB: That would be my recommendation, yes.

CHAIR: Unfortunately, time for questions has expired. You have taken a number of questions on notice and you have 21 days to respond to them. Any additional questions committee members have will be sent to you. Thank you for your time today.

Mr DAVID SHOEBRIDGE: If you need additional time, feel free to say so as it is coming to the end of the year and is probably the worst time to give you 21 days to respond.

The Hon. DAVID CLARKE: And we have put a lot onto your plate.

Dr WITZLEB: Okay, thank you.

(The witness withdrew)

ANNA JOHNSTON, Director, Salinger Privacy, affirmed and examined:

CHAIR: I welcome Ms Johnston from Salinger Privacy. Before we have questions, would you like to make an opening statement?

Ms JOHNSTON: Just a brief one. To give you a sense of my background and therefore where I am coming from with my submission and comments, I started working in the privacy area as a privacy officer for a New South Wales government department. From there I moved to a regulatory position—I was the Deputy Privacy Commissioner for a few years running the Office of the Privacy Commissioner. After that I chaired the Australian Privacy Foundation, the leading advocacy organisation. For the last 11 years I have run Salinger Privacy, my business which is a specialist privacy consulting, training and publications business. Most of my clients are government departments across all the Australian jurisdictions but I specialise in the New South Wales jurisdiction. One thing we do is to publish an annotated guide to PPIPA, the acronym for the Privacy and Personal Information Protection Act, and HRIPA, the Health Records and Information Privacy Act—if you are happy I will refer to them as PPIPA and HRIPA from now on.

CHAIR: That is fine.

Ms JOHNSTON: That is my background and area of expertise. As my submission states, in brief, I support the introduction of a statutory cause of action for serious invasions of privacy. The main reason is that I believe the remedies under existing privacy law are inadequate. My written submission gave a number of examples of what I describe as black holes, where existing laws do not provide any remedy for people who have suffered genuine invasions of their privacy and have suffered harm as a result. In addition to my written submission and having had a look at some of the other written submissions, I agree with the New South Wales Privacy Commissioner's submission in terms of the importance of protecting all dimensions of privacy not just information privacy, which is what PPIPA and HRIPA cover. Some people would call that data protection.

I also agree with the Australian Privacy Foundation's point. Increasingly, privacy risk can come through individuation without identification. This is one of the causes of the witnesses problems. In our current legislative approach to protecting privacy, everything hinges on whether or not something meets the definition of "personal information". It is entirely possible to invade someone's privacy and cause them harm without touching on their personal information. Beyond that I am happy to discuss my submission or to answer any questions.

The Hon. BRONNIE TAYLOR: Thank you very much for your submission. Not having a law degree, I really liked the way that you phrased things and talked about the issues. You are obviously passionate about this because you have worked in this area. That comes through.

Ms JOHNSTON: My grumpiness probably comes through.

Mr DAVID SHOEBRIDGE: It was a little grumpy, but that was good.

The Hon. BRONNIE TAYLOR: I prefer to call it passion. It was refreshing. I am amongst a lot of learned people here who have many questions, but I have one question. You talked about PPIPA and the reform proposed by the Australian Law Reform Commission.

Mr DAVID SHOEBRIDGE: For the benefit of the Hansard reporter, Ms Johnston will tell us what PPIPA and HRIPA are.

Ms JOHNSTON: That is the Privacy and Personal Information Protection Act 1998 and the Heath Records and Information Privacy Act 2002.

The Hon. BRONNIE TAYLOR: I do not know if I am misinterpreting you, but are you saying that you want to fix PPIPA first and then move on? Is there a reason for not moving on immediately to the legislation?

Ms JOHNSTON: No, I think that could be done in parallel. I said that we should fix PPIPA and HRIPA first because they are existing pieces of legislation and the problems in those Acts are well known. There are some things that could be done to fix them that would not be overly controversial. That would

certainly not be as controversial as the introduction of a statutory cause of action, which has already been recommended by the New South Wales Law Reform Commission and the Australian Law Reform Commission. Those recommendations have tended to be ignored by government because, generally speaking, the media would be against them. They are put on the backburner or in the too-hard basket. I do not think that one is necessarily more important than the other. Even if you fix the problems with PPIPA and HRIPA—and if everyone agrees that they are problems and wants to fix them—they focus only on information privacy and regulating certain sectors of activity. They will not deal with other dimensions of privacy in other sectors of activity. I think a statutory cause of action is a sensible way to deal with those black holes.

Mr DAVID SHOEBRIDGE: There is an amendment, which I think we are going to be considering this week, to PPIPA. It tries, in part, to address the "not in New South Wales" exemption. Would you like to speak to that briefly?

Ms JOHNSTON: Briefly, the existing problem stems from the poor drafting of PPIPA in the first place. Section 19 attempts to do two different things. Section 19 (1) tries to create extra or tougher rules for the disclosure of what is called "sensitive information"—that is, religion, ethnicity, sexuality et cetera. Section 19 (2) to (5) tries to create extra, tougher rules for the disclosure of personal information if it is leaving New South Wales—as opposed to a disclosure within New South Wales.

The way that the NSW Civil and Administrative Tribunal [NCAT] has interpreted section 19 to date is that it covers the field of disclosure, which means that the normal rule for disclosure in section 18 does not apply. That is fine for part 1, which deals with sensitive information; it is not fine for part 2, which deals with disclosures outside New South Wales, because, due to a technicality, section 19 (2) to (5) has never commenced. That effectively means that there is no rule applying to disclosures outside New South Wales. It means that as long as the information is going outside New South Wales there is no rule prohibiting a government agency from disclosing that. There are things that are prohibited inside New South Wales that are okay as long as you send the information outside New South Wales. This is clearly an absurd result.

The bill to amend PPIPA is trying to fix that problem, which is great. My view, which I have expressed to the Privacy Commissioner and some upper House members, is that the Government's drafting of the bill will not fix the problem entirely. It needs an extra subsection to make it clear that the rule dealing with disclosures outside New South Wales is supposed to be an extra, tougher set of rules that applies after you have already met the normal test for disclosure.

Mr DAVID SHOEBRIDGE: Let me be quite clear. I spoke to you last week about this point. If you are going to protect information based on a set of principles in New South Wales, those should be the baseline principles you consider if you are considering information outside of the State, as well as some additional protections.

Ms JOHNSTON: Yes.

Mr DAVID SHOEBRIDGE: That is how you think the law should operate?

Ms JOHNSTON: Yes.

Mr DAVID SHOEBRIDGE: Is there an in-principle reason that it does not do that?

Ms JOHNSTON: No, I think it is poor drafting. NCAT has highlighted this in a number of cases. Basically, the legislation needs to be fixed. There is no point in having a transborder principle—a rule about sending information outside a jurisdiction—unless you make it a tougher rule than the rule that already applies within the jurisdiction.

Mr DAVID SHOEBRIDGE: What about the "not our fault" exemption or the "personal frolic" exemption? Are there any examples that come to mind?

Ms JOHNSTON: Yes. In addition to the examples I have given in my written submission, I am sure you aware of the petition that is currently circulating—I read about it in the paper—about a patient who says she was unconscious when a nurse took a photograph of her genitals. Hospitals—whether they are public or private in New South Wales—are regulated by HRIPA. That is the kind of scenario where, if a complaint was brought against the private hospital, the hospital would presumably argue in its defence—and it would probably win the

defence—that this was not conduct authorised by the hospital, that it was a rogue employee off on a frolic of their own and that therefore the hospital was not liable.

That is, arguably, fair enough. The problem is that for the victim of that invasion of privacy there is no remedy. Both PPIPA and HRIPA have criminal provisions. So in the rogue employee scenario, that person could be prosecuted—the penalty is up to two years imprisonment—for unauthorised use or disclosure of personal or health information. The problem with that is that there has been only one prosecution in New South Wales in 15 years, and that was overturned on appeal. Even if you successfully prosecute, the victim gets nothing by way of remedy.

Mr DAVID SHOEBRIDGE: What is the answer in terms of balance? If the organisation is blameless—"We have rules and procedures and that person just went rogue"—do you hold the organisation accountable because otherwise the victim has no remedy? Is that the solution?

Ms JOHNSTON: This is where the statutory cause of action can help plug that gap. The nurse should be able to be sued personally. Hopefully the fact that people could be sued personally would act as a deterrent to their thinking about doing the wrong thing. We know it is not going to be perfect, but it would certainly be an improvement on the situation we have now.

I will add one more thing. That was an example from the media. Since I wrote my submission there has been a further very similar NCAT case. A nurse looked up his ex-wife's and her family's electronic medical records and then used them in a Family Law Court dispute. The case was *BZX v Western Sydney Local Health District* of 15 October 2015. Western Sydney Local Health District successfully argued that this was a rogue employee off on a personal frolic of his own and that it was not liable. The case is ongoing. They are still looking at whether the data security principle was breached. The complainants have lost the disclosure argument. Interestingly, one of their points about the data security principle being breached is that the complainant is arguing that the local health district has taken no disciplinary action against the nurse to date. If the employer is not taking disciplinary action and the police are not prosecuting the individual, there is not a lot of deterrence. The very least you could have is a statutory cause of action where—

Mr DAVID SHOEBRIDGE: It would give the individual a remedy.

Ms JOHNSTON: Yes, that would give the individual a remedy against the other individual as a safety net.

The Hon. BRONNIE TAYLOR: I refer to the example of the health service saying it had a rogue employee. I am not talking about a particular case. In an enormous State health district it would be very hard to stop every incident that might happen because there are some bad people doing the wrong things. Within big institutional structures things can happen. Would there not have to be some capacity to say, "In this case it was not preventable but we have to ensure that we have steps in place"?

Ms JOHNSTON: Yes.

The Hon. BRONNIE TAYLOR: I am not in any way trying to defend the actions that you have spoken about. I am just trying to be realistic—sometimes those situations do occur.

Ms JOHNSTON: The way PPIPA and HRIPA and NCAT deal with this at the moment is through the data security principles. You have the data security disclosure and use principles which say, "Do not disclose unless there is A, B, C, D and E", or "Do not use unless there is A, B, C, D and E." These are the kinds of scenarios where somebody has gone entirely outside those rules.

There is also the data security principle that says that the organisation must take reasonable steps to protect personal information from loss, misuse, unauthorised access and unauthorised disclosure et cetera. In the BZX case—the argument that is ongoing in the tribunal; it has not been resolved yet—the tribunal will look at the systemic organisational structures. It will ask, "How is your database set up? Is there role-based access control? Is there audit logging? What kind of staff training do you have? What kinds of policies and procedures do you have? Are they accessible, understandable and up to date?" Sometimes in these kinds of situations where a rogue employee does something terrible, the tribunal will find that the organisation has not met its data security obligations in the sense that its systems have been too lax and it has allowed that to occur. So it might be found in breach, and it is usually ordered to fix the systems, do better staff training et cetera. Sometimes the

tribunal says, "No, we can see that you did your best. You did the sensible things and you had best practice." Someone who has legitimate access to a system may do the wrong thing. However, the tribunal is unimpressed by cases where people get access to systems when they should not have access—where there is a failure of safeguards.

The Hon. BRONNIE TAYLOR: We have been running an inquiry into coordination of social services in areas of high social need and privacy. One of the biggest issues in socially disadvantaged communities is that sometimes organisations like health services do not share information with other government organisations or non-government organisations. That affects outcomes for people who are trying to access services. We have to be careful, do we not, in terms of being very sure about what we want to stop as opposed to what we do not want to hinder?

Ms JOHNSTON: Absolutely. You resolve those issues—getting the right information to the right people at the right time—with good system design, good staff training and good policies and procedures.

The Hon. BRONNIE TAYLOR: I understand.

Ms JOHNSTON: Quite often I find that when organisations say that privacy is a barrier and I look at what they have, it is not that the legislation is stopping them; the problem is organisational culture or poor technology.

The Hon. BRONNIE TAYLOR: Thank you.

The Hon. LYNDA VOLTZ: In your example of the bad cop, some of those issues would have been covered by the Police Integrity Commission as abuses of procedure by police. I draw that conclusion from the example of the nurse taking photos. That the nurse was still working in the area is a problem. Is the problem the disciplinary measures available to large government departments that have to deal with people who have breached procedure?

Ms JOHNSTON: Just to clarify: I understand that the example of the nurse taking a photo was in a private hospital. The nurse accessing the record for the Family Court dispute was a different case.

The Hon. LYNDA VOLTZ: It was two different things.

Ms JOHNSTON: It was two different nurses. I do not know whether the Police Integrity Commission has taken up any of the examples that I have listed. Unless one of these organisations is a client and brings me in, my knowledge is limited to what is in the media or in a NSW Civil and Administrative Tribunal [NCAT] judgement. Whether someone is disciplined is usually not mentioned in the NCAT judgement. It is unusual that the latest one has been mentioned. The allegation, at least, was made that the nurse had not been disciplined. Whether someone is disciplined does not provide a remedy to the victim. That is my main argument.

The Hon. LYNDA VOLTZ: We are dealing with a number of different issues. We are dealing with emotional distress being intentionally caused. We are looking at where individuals use private information to cause someone harm in some way, such as in the example of the nurse. We are looking at deliberate breaches of data and how that is dealt with by the organisations that oversee it. We are also looking at the rogue elements. I cannot remember the term you used. The police have a structure that means they can monitor access and can tell who has accessed the system. The breach of regulations is a serious offence. If agencies are doing what they can, is it a good idea to include in legislation an ability to pursue an organisation for an invasion of privacy rather than pursuing the individual who committed the offence? Would it not be better to allow the pursuit of the individual rather than the organisation?

Ms JOHNSTON: Yes. I propose the pursuit of the individual.

Mr DAVID SHOEBRIDGE: I thought that was your position.

Ms JOHNSTON: Yes.

Mr DAVID SHOEBRIDGE: You are talking about the situation where there is a rogue employee such as a police officer—and it does happen—who, despite the rules and controls in place, accesses the Computerised Operations Policing System [COPS] database for their own personal reasons.

Ms JOHNSTON: To target the ex-girlfriend

Mr DAVID SHOEBRIDGE: Yes, or to provide information to somebody else. They wrongfully obtain access to that data then either use it themselves or share it with another. That is controlled by police regulations, which causes the person to eventually be dismissed, but that gives no benefit to the individual whose privacy was breached.

Ms JOHNSTON: Exactly.

Mr DAVID SHOEBRIDGE: They should have a claim against the individual. Is that what you are saying?

Ms JOHNSTON: Yes.

The Hon. LYNDA VOLTZ: It would be a serious invasion of their privacy to intentionally or recklessly cause harm to them.

Ms JOHNSTON: Yes. I do not see providing a statutory cause of action to allow that kind of remedy to be obtained as being in conflict with also making the police subject to the Privacy and Personal Information Protection Act and the Health Records and Information Privacy Act in a way that they are not at the moment. It is about bringing them into line with almost all other government agencies so that if you were running an argument that they did not have good systems in place, that the COPS database was not regulated well enough, that there was not good staff training or that there were systemic problems, the individual could also make the claim of a breach of the data security principles by that organisation. Does that make sense?

The Hon. LYNDA VOLTZ: That makes sense.

Mr DAVID SHOEBRIDGE: If good rules are not being enforced and disciplinary action is not being taken, it is a hollow policy and there should be a remedy for that.

Ms JOHNSTON: Yes.

The Hon. LYNDA VOLTZ: I think in some areas there is an ability to do that. That is another debate.

The Hon. DANIEL MOOKHEY: You have had extensive experience with NCAT.

Ms JOHNSTON: I do not appear in NCAT.

The Hon. DANIEL MOOKHEY: Do you monitor it?

Ms JOHNSTON: I read all the cases and summarise them in our publication.

The Hon. DANIEL MOOKHEY: Are you able to provide the Committee with your views on the extent to which you think that or any other administrative tribunal is capable of discharging the workload that would be created by the establishment of causes of action, should the Committee decide to give them jurisdiction? The Committee is exploring non-litigation systems of resolution as well. If you could provide any views on that, it would be great.

Ms JOHNSTON: Sure. One of the positives of the Privacy and Personal Information Protection Act and the Health Records and Information Privacy Act in New South Wales, as opposed to other Australian jurisdictions, is that there is relatively easy and cheap access to the tribunal. As a result, New South Wales is the most prolific case law generating jurisdiction in the English-speaking world. It would be really important to maintain that kind of accessibility to justice in the development of any statutory cause of action.

Compare the Federal Privacy Act with the New South Wales equivalents, the Privacy and Personal Information Protection Act and the Health Records and Information Privacy Act. In 15-odd years there have been more than 300 cases in New South Wales. In the Federal jurisdiction, where one would have to go to the Federal Court, which is hideously expensive for most people, there have been three cases in a slightly longer period. That provides a concrete example of the importance of accessibility to jurisdiction.

I understand the Committee is looking at the Office of the Privacy Commissioner and/or NCAT as pathways. The New South Wales Privacy Commissioner already has, and has had since the 1970s, a function of accepting and conciliating complaints in relation to any kind of privacy. Section 45 of the Privacy and Personal Information Protection Act allows a reserve jurisdiction for any complaints. That is unusual for privacy commissioners. It is not limited to information privacy. It is not limited to the public sector or the health sector, which are covered by the privacy principles. If someone wants to complain about the peeping Tom or the drone flying overhead or the ex-boyfriend publishing revenge porn, they can already now, in theory, complain to the New South Wales Privacy Commissioner. In practice that is fairly useless. As I am sure the Committee has heard, the New South Wales Privacy Commissioner's Office is massively underfunded, underresourced and underskilled.

The Hon. DANIEL MOOKHEY: They do not have determinative powers, do they?

Ms JOHNSTON: They do not have any enforcement powers whatsoever. The best they can do is conciliate a complaint. So non-litigation already exists as an alternative dispute resolution mechanism but it does not make much of an impact.

Mr DAVID SHOEBRIDGE: Perhaps if you are putting a statutory scheme in place, allowing any conciliated outcomes to be binding and giving certain determinative powers to the Privacy Commissioner would be an important way forward.

Ms JOHNSTON: I think that would be a way forward. It would be a very big difference from the way the New South Wales Privacy Commissioner has operated before. The danger of that model versus the NCAT model is that, as has happened repeatedly, the Government cuts the funding of the New South Wales Privacy Commissioner's office.

Mr DAVID SHOEBRIDGE: So you would not have it as an alternative. It would be an additional remedy.

Ms JOHNSTON: Yes, as an additional route. I certainly would not have it as the only pathway because it very quickly gets blocked. NCAT already has jurisdiction over privacy in the private sector, under the Health Records and Information Privacy Act. It also has jurisdiction over the private sector in various other sectors, including real estate tenancies and firearms. I would prefer a model where the Privacy Commissioner publishes guidelines on what the serious invasion of privacy means and what the threshold is. NCAT is the judicial arm and it attempts alternative dispute resolution before things get to the litigation stage.

Mr DAVID SHOEBRIDGE: You said there have been 300 cases dealing with privacy under the New South Wales law and about three federally. Has that assisted the institutional responses to privacy law in New South Wales? Is it a good thing?

Ms JOHNSTON: That is a good question. I think you could do a PhD examining that question. What actually makes a difference to institutional response or organisational culture is having a proactive Privacy Commissioner who offers lots of guidance and training and publications. I see a difference in Federal, New South Wales and Victorian government agencies, through my clients. It is not fear of the cases or fear of litigation that drives the interest in compliance. That is especially the case in New South Wales, where the maximum compensation under the Privacy and Personal Information Protection Act is $40,000, and it has been ordered only once in 300 cases. Most of the cases are $5,000 to $10,000, if that. What really drives organisations to want to do the right thing is not so much fear of litigation; it is either that they have an active Privacy Commissioner breathing down their neck and/or fear of public comments.

Mr DAVID SHOEBRIDGE: Shaming.

Ms JOHNSTON: Yes, public shaming by the Privacy Commissioner. It can also be an understanding of best practice, customer expectations and doing the right thing. However, for the individual affected by a privacy breach—

Mr DAVID SHOEBRIDGE: The remedy is important.

Ms JOHNSTON: The remedy is important. You are better off having a complaint against a New South Wales government department than against a Federal government department for that reason—the accessibility to the tribunal.

Mr DAVID SHOEBRIDGE: I will ask you something designed to make me unpopular throughout the entire building. You mentioned the black holes where the law does not apply.

Ms JOHNSTON: Are you going to say, "Abolish the States"?

Mr DAVID SHOEBRIDGE: No. It is even worse than that. You say:

> Political parties. Hoovering up data from petitions, letters to newspapers and approaches to constituents' local MPs, mining it to make assumptions about political opinions, and then crafting messages skewed to individual voters? Not regulated.

I assume you draw that conclusion as a bad thing.

Ms JOHNSTON: Yes.

Mr DAVID SHOEBRIDGE: Do you suggest a response?

Ms JOHNSTON: Yes. One of the reasons that the European Union considers Australian privacy law to be inadequate to European standards is the political party exemption, as well as the small business and media exemptions. The political party exemption is mirrored in Federal privacy law; this is not just a New South Wales issue. Where political parties collect data on voters and use it to target those voters, I do not see why political parties should not be held to account to the same standards as other organisations doing the same thing.

The Hon. DANIEL MOOKHEY: What about GetUp!, or trade unions or Australians for Constitutional Monarchy? Should other civil action groups that engage in political activity also be regulated?

The Hon. LYNDA VOLTZ: And Change.org.

Ms JOHNSTON: If they have more than a $3 million turnover they are regulated now.

The Hon. DANIEL MOOKHEY: Sure, but a lot of those organisations do not.

Ms JOHNSTON: That is the small business exemption. I also think that the small business exemption should be abolished, for that reason.

The Hon. DANIEL MOOKHEY: So you are not singling out political parties?

Mr DAVID SHOEBRIDGE: You want to rope them in, not single them out.

Ms JOHNSTON: Yes.

The Hon. DANIEL MOOKHEY: Do you think the people who mimic those activities for causes, such as environmental groups, should be included?

Ms JOHNSTON: Yes. Whether you are a small business or a small non-government organisation, or a political party, the way the law is structured now—

The Hon. LYNDA VOLTZ: It is the way you are defining it. If you sign a petition on the Change.org website, they capture your email address and use it to email other material to you. They are not a political organisation and they are probably not a small business, but they are in the political domain. The problem is: What do you do with third parties in the political domain?

Ms JOHNSTON: We are talking now about the Federal Privacy Act, which covers the public and private sectors. In the private sector column there are some exemptions: media organisations, political parties and small business. Business does not mean "for profit". It means any private sector organisation.

Mr DAVID SHOEBRIDGE: It is the turnover.

The Hon. DANIEL MOOKHEY: Your point is that exemptions should be removed altogether not widened to cover or to include groups like Getup!, for example?

Ms JOHNSTON: Yes, I would abolish all three exemptions but I am not in charge of this. The point is with the change.org to Getup! or whatever, at the moment either they are covered by the Privacy Act now if they have more than a $3 million turnover or if they have less than a $3 million turnover they are called a small business.

Mr DAVID SHOEBRIDGE: Regardless of whether or not they are a business?

Ms JOHNSTON: Regardless of what the business is, not-for-profit or regardless of the nature of the business, they would fall under that exemption.

Mr DAVID SHOEBRIDGE: The Greens, The Nationals, the Liberals or the Australian Labor Party can have a turnover of $3 million, $4 million, $5 million, $10 million or $50 million and they will never be covered because of the exemptions.

Ms JOHNSTON: Because there is a separate exemption for political parties.

The Hon. LYNDA VOLTZ: What about registered charities?

Ms JOHNSTON: It depends on whether they are over or under $3 million turnover. The nature of the business is completely irrelevant in regard to the small business exemption, if that makes sense.

The Hon. LYNDA VOLTZ: It is whether or not they take a profit.

Ms JOHNSTON: It is whether or not you are over or under a $3 million turnover.

The Hon. LYNDA VOLTZ: I am not familiar with this area. What defines you as a business? Is it an ABN or is it an ACN?

Ms JOHNSTON: It is that you are an incorporated entity. I cannot remember exactly but corporations, incorporated entities, partnerships or whatever. It is any kind of non-individual organisation.

The Hon. DANIEL MOOKHEY: But your general contention is that political purpose should have no impact on an organisation's ability to aggregate to assist in voter communication? That category of behaviour should not attract an exemption on public policy grounds?

Ms JOHNSTON: Yes.

The Hon. DAVID CLARKE: The abuse of privacy allowed under what you refer to as the personal frolic exemption screams out for reform. It is unbelievable that this conduct is exempt and that people's personal details and so forth are abused in such a way. Anybody who is not moved to demand reform in view of these examples and probably thousands of others like them needs to look at themselves.

Ms JOHNSTON: Yes, to me these are examples of where the conduct that has occurred has been admitted usually. Whether it is a government agency or whatever has said, "Yes, this happened. No, it should not have happened. We are really sorry but it is not our fault." I appreciate that at a certain point organisations can only do so much. I would love to see them doing absolutely everything they can to avoid these kinds of situations happening, but ultimately there are going to be some bad apples that do the wrong thing. One view is that you say, "No, we are not going to have them. With the personal frolic exemption, let us tighten up the law and let us make government agencies responsible for gross misconduct by their employees."

I can see that that might attract the kind of criticisms that you are creating a honeypot and I can understand there some secretaries of departments would be pretty unhappy with that approach; that their agency should be liable for every little wrong thing that their staff do. It is one approach to take but I think potentially we should leave that exemption as it is, so long as there is a statutory cause of action to kind of mop up after the effect to allow the individual who has been harmed to seek compensation.

The Hon. DAVID CLARKE: What avenues are open against those people who have perpetrated the sort of abuse of privacy to which you refer?

Ms JOHNSTON: At the moment section 45 of the Privacy and Personal Information Protection Act allows any person to bring any kind of privacy complaint to the Privacy Commissioner but the best you can do is conciliate an outcome. Where you are complaining about your next door neighbour or your ex-boyfriend or whatever it is, the Privacy Commissioner has no powers to compel that person. Unless she exercises her full royal commission powers she has no ability to compel the ex-boyfriend or the neighbour to answer any questions or appear. Even if they do appear and answer questions the best you can do is to try to get them to agree to a remedy, which is pretty unlikely in these scenarios.

The Hon. DAVID CLARKE: You have given as an example looking up a person's criminal record without authority and using it to blackmail him. You are saying that is exempt. Surely there are other avenues?

Ms JOHNSTON: Exempt in the sense that the complainant said that the government agency, the employing agency, was in breach of the use and disclosure rules, and they argued successfully in the tribunal, "It is not our fault." Yes, the employee had legitimate access to the criminal records database as part of their job. They worked in Corrective Services but, no, they should not have used this to blackmail an individual.

Mr DAVID SHOEBRIDGE: And they knew it was wrong and they did it regardless?

Ms JOHNSTON: Yes.

The Hon. LYNDA VOLTZ: The person or the organisation would still be covered.

Ms JOHNSTON: But they cannot be held liable.

The Hon. LYNDA VOLTZ: So the person would be covered?

Mr DAVID SHOEBRIDGE: No. As I understand it, the person may be covered by the criminal law of blackmail but there is no civil remedy against the person because there was no tortious claim. The only damage is distress which does not lead to psychological harm so the person has no remedy. Is that the point?

Ms JOHNSTON: That is right. So the Privacy and Personal Information Privacy Act and the Health Records and Information Privacy Act only regulate organisations, not the individuals employed by those organisations. So the complaint can only be brought under the Privacy and Personal Information Privacy Act or the Health Records and Information Privacy Act against, in this case, the Department of Corrective Services and the department in that case said, "Not our fault; rogue employee" and that was the end of the case.

Mr DAVID SHOEBRIDGE: Even if we did not go to the point of saying—and I am not suggesting that this would be a good outcome—"Let us immediately legislate for the full set of tortious laws proposed by the Australian Law Reform Commission" at a bare minimum as a fall-back we should say that individual employees of agencies should be subject to a claim if they breach someone's privacy?

Ms JOHNSTON: I guess you would probably use the language in the criminal sections of the Privacy and Personal Information Privacy Act or the Health Records and Information Privacy Act which talk about deliberate and malicious conduct. So you might say that as well as these being criminal offences and you could be sent to gaol for two years, which in practice does not really happen, maybe you could also be sued personally by the victim for your conduct. That might be one way to deal with that.

Mr DAVID SHOEBRIDGE: Very substandard compared to a fully fledged remedy?

Ms JOHNSTON: Yes, but it might a good first step.

The Hon. DANIEL MOOKHEY: If the cause of action is limited to seclusion or essentially a species of privacy that provides some form of protection, do you think it should be wider than that? That does not necessarily capture people's relationship with government because obviously you do expect to have a reasonable expectation of privacy when you deal with government. Do you think that the remedy needs to go further and, if so, in what respect?

Ms JOHNSTON: I think the drafting of a cause of action needs to go further.

The Hon. DANIEL MOOKHEY: Do you think a much more general cause of action is needed rather than specifically limiting it to that category of privacy?

Ms JOHNSTON: Yes. The difficulty is that privacy is not easily defined. For example, the French do not even have a word for privacy so their equivalent Privacy Commissioner is called the Commissioner for the right to liberty and the ability to lead a private life—an incredibly long title. The idea of privacy is not easy to define or categorise but normally I break it down into four categories. One is the privacy of your personal information which is what Privacy and Personal Information Privacy Act and the Health Records and Information Privacy Act attempt to cover; the privacy of personal communications; the privacy of personal behaviour which is where surveillance and monitoring usually comes in; and your territorial privacy which might be physical or your home and the right to seclusion tends to touch on that final aspect. But these are not hard and fast categories.

The Hon. DANIEL MOOKHEY: Should the tort in its current form be endorsed by this Committee and then the Parliament? The prime basis of privacy protection for people's relationship with government is still likely to be the Privacy and Personal Information Privacy Act or the Health Records and Information Privacy Act, not the tort?

Ms JOHNSTON: For the most part, yes. When it comes to, say, law enforcement they might get more into surveillance and so behavioural privacy or territorial privacy. But for the most part, yes, people's relationship with government is about the appropriate handling of their personal information.

Mr DAVID SHOEBRIDGE: The relationship with government—the Government abusing private information—would be picked up by the second limb from the submission of the Australian Law Reform Commission which is the misuse of private information. Wherever the Government or a government agency misused it they would be susceptible to a claim?

Ms JOHNSTON: I would hope so, yes.

The Hon. DANIEL MOOKHEY: What about private sector information collection, dissemination and aggregation? The tort also would suffer from the defect of not really being applicable to that category of information as well, and nor do the Privacy and Personal Information Privacy Act or the Health Records and Information Privacy Act. In respect to the Federal laws, the Privacy Act is designed to cover essentially the commercial behaviour.

Ms JOHNSTON: Yes.

The Hon. DANIEL MOOKHEY: To what extent do you think this tort could be adapted and designed specifically to provide to an individual an ancillary or a remedy for those types of breaches? Do you think it should have any role or we should leave it to the Federal Government to cover that specific private sector collection and information? The issue is that the same problem you have spotted—that an individual does not have a remedy—applies also to Federal laws for commercial and private trade of information. Am I wrong in that respect?

Ms JOHNSTON: Where there is an exemption for the conduct the same problem arises. My opinion is that creating distinctions between the public sector and the private sector is fairly artificial. The way law reform is moving is to break down those distinctions and apply the same sets of rules to both. The Federal Privacy Act was amended early in 2014—there used to be two separate sets of rules but it has brought them into one to break down those distinctions. I do not see any reason why you would have a statutory cause of action applying only to the public sector.

Mr DAVID SHOEBRIDGE: The proposal of the Australian Law Reform Commission applies across the board.

Ms JOHNSTON: Yes.

Mr DAVID SHOEBRIDGE: And its thresholds are recklessness, seriousness and intentional. It is not proposing a public, private distinction that applies across the board?

Ms JOHNSTON: No.

The Hon. DANIEL MOOKHEY: I was not suggesting that. Are there any features of private sector behaviour that you think we should be conscious of in designing the tort? The explosion of data trading and all those types of aspects and the emergence of this as a data market are pretty big developments. Have you spotted anything that you think arises from these developments that we should be conscious of in designing this tort?

Ms JOHNSTON: The really big emerging issue is big data, but that is not only a private sector issue. We have got government and university clients doing big data projects as well. If you want to take some private sector behaviour as an example to make sure it is the kind of thing that is covered by the tort I would look at some of the things that Facebook does as an example. I mentioned earlier the issue of individuation as opposed to identification—where an organisation, be it a business or government, is able uniquely to pull out someone from the crowd, uniquely target someone within a crowd, if you like, without necessarily knowing exactly who they are.

I am referring to the kind of scenario where a shopping centre tracks your movements as you walk through, whether it is through closed-circuit television or it pings off the media access control or MAC address of your phone and it knows that a certain person who is called A, B, C, D or E went to McDonald's, then to Just Jeans, and then wherever. It knows when that person sends phone messages or it tracks the person's behaviour without ever knowing that it is you. If that kind of behaviour—reckless, serious, invasive or whatever—meets the threshold test you would want to include a statutory cause of action. Last year a project was done between Facebook and Cornell University in the United States of America which they called "research" to look at emotional contagion.

Facebook deliberately altered the newsfeeds of some users and then claimed that it was testing how that impacted on their emotions. When it became public knowledge people said it was a breach of privacy and so on. Facebook's response was that they consented to the terms and conditions. Cornell University's response was that it was not a breach of privacy because the university did not know who the individual users were. The fact is that Facebook individuates without necessarily identifying, targeting and manipulating those individuals, impacting on their personal autonomy or messing with their emotions in a way that I would describe as a breach of privacy. What we now describe as privacy laws go nowhere near to addressing that.

Mr DAVID SHOEBRIDGE: So a corporation can understand that you have a package of traits because it has been following your data for a while?

Ms JOHNSTON: Yes.

Mr DAVID SHOEBRIDGE: But it does not specifically know who you are?

Ms JOHNSTON: Yes.

Mr DAVID SHOEBRIDGE: But that data is valuable and able to be traded?

Ms JOHNSTON: Yes, it knows that you like golf and that you want to buy a washing machine.

Mr DAVID SHOEBRIDGE: When I go to the Woolworths website I get offered organic apples and so on.

Ms JOHNSTON: Yes.

Mr DAVID SHOEBRIDGE: That is a package of traits.

Ms JOHNSTON: Yes.

Mr DAVID SHOEBRIDGE: They do not identify the individual as a person, but you are saying that privacy legislation needs to catch up with that.

Ms JOHNSTON: Yes.

The Hon. DANIEL MOOKHEY: Presumably that would have to be picked up in the definition of "intrusion".

Ms JOHNSTON: I guess so.

The Hon. DANIEL MOOKHEY: Or not necessarily. You may want to call it something else. It seems that if you wanted to claim the remedy you would have to prove under the existing design that it was an intrusion.

Ms JOHNSTON: Yes, it somehow intruded on your personal affairs, your seclusion and so on.

Mr DAVID SHOEBRIDGE: The problem with "personal" is whether it is a package of traits of an unidentified person. It is a little data package.

Ms JOHNSTON: But the extent to which your behaviour has been manipulated to vote a certain way or buy—

The Hon. DANIEL MOOKHEY: I can see how it would be very difficult to get into this jurisdiction if you had to prove it was intrusion. The species of behaviour Mr Shoebridge referred is essentially predictive analytics. That is a huge thing; that is where we are going to with the credit card market and so on. Do you believe the Committee should examine whether it should come up with a different definition or use a different definition that can be put forward by the ALRC to pick that badge for everything?

Ms JOHNSTON: I do not claim to be an expert in tort law or the drafting of a statutory cause of action. However, ideally the statutory cause of action should cover that kind of predictive analytics. That is not to say that it should be outlawed. It should cover where it has somehow been misused and caused someone harm. The kind of examples we are seeing in the United States include—

The Hon. DANIEL MOOKHEY: The Target pregnancy case?

Ms JOHNSTON: Yes, the teenage pregnancy scenario. For example, a page—I do not remember whether it was Facebook—was set up to organise a Harvard University 20 year class reunion. The classmates who had what the computer saw as Anglo names were served up with ads for Rolex watches and golf club memberships. The classmates with African-American sounding names were served up with ads about how to clear a criminal record[1].

The Hon. DANIEL MOOKHEY: It was racial profiling.

Ms JOHNSTON: Yes. It is something that should be covered. Racial profiling is a potential outcome of predictive analytics, and we as a society might dislike it.

Mr DAVID SHOEBRIDGE: Of course, one way in which large corporations try to avoid any of these regulations is to get people to tick the "I agree" box. I am sure I did it last night when I updated the operating system on my Mac. I ticked the "I agree" box to accept pages and pages of text without reading it.

Ms JOHNSTON: No-one reads it. I do not read those documents and part of my job is to write them.

The Hon. BRONNIE TAYLOR: That is terrifying.

Mr DAVID SHOEBRIDGE: I could not bargain about it; I could not say, "I do not like clause 13.2 but otherwise I am okay."

Ms JOHNSTON: No.

Mr DAVID SHOEBRIDGE: How do we ensure that they do not avoid our statutory regime by using this mock consent that we give?

[1] *Clarification: Ms Johnston has advised that this example was given in error. She has subsequently referred to a study by a Harvard academic into discriminatory racial profiling affecting Google ad results. Refer to correspondence dated 20 November 2015 from Ms Johnston to the Chair.*

Ms JOHNSTON: Calling it "mock consent" is correct. You have highlighted a weakness in our current privacy law. I will provide a brief lesson in geography and different jurisdictions. There is an American approach to privacy law and the approach taken by the rest of the world. The rest of the world adopts the kind of model that we have in our privacy legislation. In the Privacy and Personal Information Protection Act 1998 and so on we refer to omnibus privacy laws, meaning that we have some general privacy principles and we apply them to almost every sector—let us leave aside political parties, small business and everything else. In America they have one law for financial privacy, one for education records and one for video rental privacy; there are no overriding privacy principles. As a result, massive sectors in America, including the entire IT industry, are not regulated by the kind of privacy principles that we have in this country. They are only regulated by the Federal Trade Commission. They are coming from the consumer protection/misleading and deceptive conduct angle, which means that their defence to any claim is, "You ticked 'I accept', and we are going to call that consent. That allows us to do whatever the hell we like with your information." I do not think that that washes under Australian law if you are an entity regulated under privacy law, because the privacy principles say, "Regardless of what the person ticked, you can collect, use or disclose only in these circumstances."

Mr DAVID SHOEBRIDGE: One of the defences proposed by the Australian Law Reform Commission is consent. We would have to ensure it was actual consent.

Ms JOHNSTON: Yes. The jurisprudence around consent in Australia is that it must be entirely voluntary. There must be a genuine choice; that is, you must have the ability to receive the good or service and still say "no" to the extra question.

Mr DAVID SHOEBRIDGE: So the consent that I gave to the State Government in respect of my Opal card about breaching my privacy—

Ms JOHNSTON: I would not call that real consent.

The Hon. DAVID CLARKE: There is the drycleaner scenario. If your clothes are destroyed, they resort to the disclaimer.

CHAIR: The time has expired. If you would like to make some final comments, please do so.

Ms JOHNSTON: The privacy principles say that you can use or disclose for the primary purpose for which the information is collected, or for a directly related secondary purpose, a law enforcement purpose and so on. There are many exemptions, one of which is consent. For the most part, a government agency should not be relying on consent; it should be relying on primary purpose and a directly related secondary purpose for all routine uses and disclosures. Consent should be for the unusual situations where it is something extra.

Let us say you want to buy a new Apple Mac and it is compulsory for you to hand over delivery and credit card details to enable the transaction. Then there is another question: "Do you also want to receive our newsletter?" You are free to agree or not and you will still get the goods and services you want. That is what I call genuine consent. It is also what privacy commissioners in Australia and the jurisprudence say is genuine consent. If it is a routine use or disclosure, a government agency or company should not be asking for your consent. It should be saying only that it is a condition of your buying this good or service or accessing this good or service. Your only choice is not to get the good or service. They have to provide a privacy notice about that, but I do not think it should be dressed up or that they should use the language of consent. In terms of the statutory cause of action, if there is a defence of consent it has to be genuine, informed and specific consent where the person had a genuine choice to say "no" and still get the good or service they wanted.

CHAIR: Thank you for appearing before the Committee. As I said, unfortunately the time for questions has expired. Any questions taken on notice should be responded to within 21 days. Any supplementary questions members wish to ask will be sent to you in the next few days.

(Luncheon adjournment)

SOPHIE FARTHING, Senior Policy Officer, Public Interest Advocacy Centre, and

EDWARD SANTOW, Chief Executive Officer, Public Interest Advocacy Centre, sworn and examined:

CHAIR: Would you like to make an opening statement?

Mr SANTOW: We would like to thank this Committee for the opportunity to give evidence on this issue. The Public Interest Advocacy Centre [PIAC] is a community legal centre focused on achieving social justice with particular emphasis on the most disadvantaged and vulnerable people in New South Wales. The evidence that we provided in our submission and the evidence we propose to give today is based largely on our casework experience working with vulnerable and disadvantaged people in New South Wales.

Broadly speaking, in relation to privacy we acknowledge that it is an important human right. Unlike some human rights it is not absolute but that, nevertheless, it is still a very important right and deserves careful protection. The fact that it is not an absolute human right under international law means that the best approach is for parliaments in Australia to calibrate very carefully their privacy legislation to take into account other competing rights and interests while at the same time ensuring that proper protection is given to privacy in this State. Our general position and the details of our position are set out in our submission.

Broadly speaking, we support the proposal for a statutory cause of action for breach of privacy under New South Wales law. In our submission we have gone into some of the specific details and we are happy to elaborate on that in questioning. We also note that privacy law reform in New South Wales specifically, but in Australia more generally, has been continuing rather incrementally over a period of well over a decade. There have been numerous inquiries, particularly from the Australian Law Reform Commission and NSW Law Reform Commission as to how privacy should be better protected, including this question of whether a statutory cause of action should be enacted. I think it would be timely for the New South Wales Parliament to reach a firm conclusion on this issue.

The Hon. LYNDA VOLTZ: In regard to section 578C of the Crimes Act, which you suggest may be an area where legislative changes could be made and in one case have previously been used, could you explain in what way you would envisage the Act being amended and used?

Ms FARTHING: I think in terms of looking at the lack of protection in criminal law, we make various submissions. Our basic submission is that we certainly support the enactment of a criminal offence where there is intentional distribution of an intimate image with the intent to cause harm and emotional distress. We suggest various ways to do that, but we are not wedded to any particular response. With section 578C (2) what we understand is the difficulty of understanding how broadly that offence will apply. I do not have the provision in front of me. It is a question of looking at the definitions of "indecent article". We understand it has been used. We do not, from our experience, know if it has not been used in particular circumstances and so whether there would be more amendments that would be required to make sure that it does apply to all these cases, which is why we say in principle we support the enactment of a criminal offence. With any enactment of a criminal offence, particularly in this area, it would need to be targeted. That goes without saying. I would be happy to take on notice a more specific explanation if that does not suffice in relation to 578C (2).

Mr DAVID SHOEBRIDGE: There has been critique about the term "indecent article" as one of the failings in the way that section 578C (2) operates. Do you share that concern?

Ms FARTHING: Not from our direct casework experience. Certainly from the reading we have done about this particular provision, it is a concern that it does not apply to all the situations that present. One thing we know with privacy and serious invasions of privacy is that there are examples of people who have not been able to find recourse in criminal law. It is important they should be able to do so, whether by amending a current offence or by enacting a new one. Obviously, you need remedies for the individuals but also need to address some of the other concerns that I know the Committee was looking at in the previous oral hearing in relation to changing the social norms and concerns raised about having to change in a rapidly developing technological environment, being able to address those specific incidents and making sure that there is change and awareness that this behaviour is morally wrong.

Mr SANTOW: The Australian Law Reform Commission in the 2008 report specifically advised that privacy legislation should be, wherever possible, technologically neutral. On the other hand, the ALRC also

acknowledged that this is an area that is susceptible to very rapid change. We see that every day. That means that the Parliament needs to be quite agile in ensuring that both the criminal and civil law is amended to take account of new developments and this one is clearly a very important new development.

The Hon. LYNDA VOLTZ: I am not a lawyer by trade but when you talk about the enactment of a new targeted offence and the aggravated circumstances are you implying that that is something you want to see as part of a new offence or something that would be up to judicial discretion?

Ms FARTHING: We make the submission envisaging it as part of a new offence. That comes specifically from the types of clients that PIAC represents in strategic litigation. All our clients suffer from multiple disadvantage. They are vulnerable for various reasons. That is something we would see as an extra limb to be taken into account in sentencing, for example, when you have a particularly vulnerable person who has been the victim of the offence.

Mr DAVID SHOEBRIDGE: The Women's Legal Services NSW says that a lot of its caseload relates to women who are the subject of domestic violence. It is already down in the Local Courts with the police where apprehended violence orders [AVO] are being sought. From its experience on the ground the one positive thing we could do would be to empower magistrates to issue take-down orders and injunctions in AVO proceedings. What do you say to that proposition?

Ms FARTHING: We cannot say from our direct casework experience, but reading the submission of the Women's Legal Service [WLS] and the evidence they gave to you, it is something we would in principle support. It seems from the great depth of knowledge that the WLS has that it would be a sensible option and a practical solution to help in these very specific circumstances.

The Hon. DANIEL MOOKHEY: I want to ask you about the design of the tort and how it should be configured. First, I am confused about your submission. Is it your view that the seriousness test should be dropped or do you think that should be a threshold for jurisdiction? I am a bit confused with paragraphs 5.2 and 5.3. It could be that I am simply misreading them. Is it your contention that there should be a tort for invasions of privacy or serious invasions of privacy?

Ms FARTHING: We do not think "serious" needs to be defined. We think it should be taken into account in the reasonable expectation tests that the Australian Law Reform Commission has set up.

The Hon. DANIEL MOOKHEY: But the jurisdiction itself should not be based on the fact that there is a serious breach.

Ms FARTHING: Where the action in tort is founded should stem from the incident and then be assessed according to the two stage test that the ALRC has set out.

Mr SANTOW: It should be in respect of serious invasions not trivial invasions of privacy.

Mr DAVID SHOEBRIDGE: Should you exclude the word "trivial" or should you require it to be serious? A previous witness, Dr Witzleb, and a number of academics who gave evidence earlier, said that the serious test can be problematic because you will not know whether or not it is serious until you have looked at all the circumstances and heard the case. It may be an inappropriate threshold, but excluding "trivial" might be a better way of doing it?

Ms FARTHING: It makes sense to look at the specific incident in relation to the person because of the nature of privacy and privacy is an inherent quality we have as part of our personhood, so what is trivial for one person might be serious in another circumstance.

Mr DAVID SHOEBRIDGE: A bad threshold is one where you can only work things out once you have heard all the evidence, taken everything into account and come to a conclusion at the end of the day. That is almost the worst threshold you can have, is it not because you cannot answer the threshold until the end of the case?

Mr SANTOW: I think it would be invidious for us to take a definitive position on using that in the drafting of the legislation, I do not think we have properly turned our mind to it.

The Hon. DANIEL MOOKHEY: Do you think that negligent breaches of privacy should be included?

Ms FARTHING: Yes, we do. We are supportive of the position taken by the Australian Law Reform Commission, but there are a few key differences and that is one, because a negligent action, which leads to a breach of privacy, could be so damaging to the individual involved. We do support expanding the test, as the NSW Law Reform Commission expanded it, to cover not only intentional recklessness but also negligence.

Mr DAVID SHOEBRIDGE: Is there an argument for expanding the jurisdiction to include negligent breach to ensure that we do not trap mums and dads and Bronnie Taylors and David Shoebridges who might accidentally hit "reply all" on an email or post something on Facebook without fully considering everything? What we are talking about in regard to negligence is corporations aggregating data and having an obligation to protect it. If you are going to put a negligence test out there it should probably be a higher test for organisations that have the resources and the capacity to put in place protective measures. Do you see an argument for that?

Mr SANTOW: The law of negligence is exceptionally well developed in Australia, as it is in other common law countries and it already takes account of the individual who is being accused of negligent behaviour, their background, their wherewithal—all of those sorts of things, so I think that would naturally take place by including negligence.

Mr DAVID SHOEBRIDGE: But if Mr Clarke did not realise, did not take the time to read that the "reply all" included 47 media organisations and he just pressed the button, is that something we should be roping into the tort?

Mr SANTOW: Again I think it is invidious to consider a hypothetical example without any detailed context. The point I am trying to make is a slightly different one, and that is, there would be more expected of a media organisation or a corporation with significant resources behind it in respect of negligence than there would be of an individual, particularly a very busy individual but that is already part of the Australian law of negligence.

The Hon. DANIEL MOOKHEY: On page 11 you say that should we create a new tort we should extinguish any remaining common law privacy rights. You presumably mean by that all the other claims to privacy under existing torts?

Mr SANTOW: The path that we are on in Australia, and specifically in New South Wales at the moment, is probably towards the development of a common law tort for breach of privacy. The good thing about that is that is what the common law commonly does, namely, addresses a gaping hole in legislation. The bad thing about that is that it is a fundamentally undemocratic way of addressing that hole. The way in which the common law develops tends to be non-linear. To put it as charitably as possible—

The Hon. DANIEL MOOKHEY: Ad hoc?

Mr SANTOW: —it develops in an organic way whereas if the New South Wales Parliament were to come in and legislate to create a statutory cause of action, I do not think the Parliament would then want people to be able to choose to go down a common law route or a statutory route. They would want people to use only the statutory cause of action that the Parliament itself creates.

The Hon. DANIEL MOOKHEY: In your view does that present an opportunity to simplify the existing position under the existing common law torts?

Mr SANTOW: Yes, it does. The only caveat to that is that there is not a well-developed privacy tort that exists. Instead, what tends to happen at the moment is that individuals try to fit square pegs in round holes and will use other causes of action such as breach of confidence in a situation where fundamentally the concern is a breach of privacy.

The Hon. DANIEL MOOKHEY: Another area where you vary from the Australian Law Reform Commission [ALRC] is that you suggest that in designing this tort we should be giving some sort of instruction to a court or anybody to whom we hand jurisdiction to factor in cultural conceptions and definitions of privacy on the assumption that that obviously impacts on people's behaviour as well. Can you elaborate how that will

look, what precise guidelines will be able to override a court and how that should be factored in? I could not see any aspect of the ALRC report which touched on that.

Ms FARTHING: I think it is there. I cannot remember exactly where it is. I think it may be in the non-exhaustive list of recommendations.

The Hon. DANIEL MOOKHEY: It is on page 13—"In addition to the nine factors … PIAC suggests that 'cultural background' should be expressly included when a court considers the relevant attributes of the plaintiff'". The only reason I am asking specifically about those—and you can take them on notice if you want to—is that it is a pretty broad instruction to be giving to a court. Can you point to any jurisprudence or to anything a court would have to do to assess a plaintiff's background?

Mr SANTOW: Cultural background, with respect, is actually a relatively narrow criterion. To give a parallel, under defamation law in New South Wales, a court will consider a person's background, not just their cultural background, but will consider a range of aspects to their background in determining the impact of a defamatory statement on them. To give an example, if a defamatory statement is made of an ordinary member of the public, that would be one thing. But if a defamatory statement is made of someone who has already been convicted of multiple offences, a court will essentially provide a discount to take into account the fact that their reputation has already been harmed by their own actions. It is a natural parallel to consider in respect of privacy the likely impact on someone being either amplified or diminished based on their particular cultural sensitivities.

The Hon. DANIEL MOOKHEY: But you mean this in return to a person's reasonable expectation to privacy, with the assumption that some aspects of a person's culture might mean that they have an expectation towards more privacy or less privacy or both?

Mr SANTOW: It could be both or either. For example, ripping off a person's religious headscarf would be quite different from ripping off a person just wearing a scarf that had no religious significance, to give a hypothetical example.

Ms FARTHING: Just to clarify, our understanding of what the Australian Law Reform Commission was recommending is that there be a non-exhaustive list of examples, so rather than an instruction to the court to consider in every single case, we understand it would be included in the legislation to assist the court as they determine where there is a reasonable expectation of privacy and whether that is going to be offensive to a reasonable person. We were not suggesting that there should be an exhaustive list of matters that the court should have to consider when considering whether someone's privacy has been invaded. We see it as a tool to assist the judiciary in the task in every single individual case they consider.

The Hon. DANIEL MOOKHEY: What do you point to as the remedies, which is on page 15 of your submission? Has your centre given any thought to remedies at the interlocutory stage, particularly restrictions on re-publication and whether or not existing jurisprudence on how you access interlocutory relief needs to be adjusted to account for privacy specific claims, or do you think that the existing thought on how you access interlocutory relief is adequate to address all the factors arising from a privacy claim?

Ms FARTHING: We have not considered that in detail. We would be happy to take that on notice.

The Hon. DAVID CLARKE: Mr Santow, have you seen the submission by Anna Johnston of Salinger Privacy, the former Deputy Privacy Commissioner?

Mr SANTOW: I think my colleague Sophie Farthing has.

Ms FARTHING: I have read it.

The Hon. DAVID CLARKE: She gives a series of exemptions, which she calls the personal frolic exemptions, of employees working for an employer where there have been privacy breaches. As a lawyer, a client comes to you and complains of somebody looking up a person's criminal record without authority and using it to blackmail that person. If that victim came to you, there is a criminal remedy for that blackmail, is there not?

Mr SANTOW: Yes.

The Hon. DAVID CLARKE: There is either a civil or criminal remedy. These people come to you seeking advice for a criminal or civil remedy. Disclosure of the contents of a complaint letter by an employee of a local council to the person the subject of the complaint and the victim comes to you and says, "Do I have a remedy?" Can you think of any civil or criminal remedy for that?

Ms FARTHING: Can you repeat that example?

The Hon. DAVID CLARKE: The unauthorised disclosure of the contents of a complaint letter by an employee of a local council to the person who is the subject of the complaint?

Mr SANTOW: It would really depend on the circumstances.

The Hon. DAVID CLARKE: But in those circumstances is it possible?

Mr SANTOW: It is a possible breach of confidence but in respect of your first example, the fact that there may well exist a criminal remedy does not necessarily put the individual who is being wronged in a remedied position just as if—to use a hypothetical person—John is assaulted physically on Macquarie Street, there would clearly be a criminal remedy in respect of that but John would also be injured; he may well have medical and other expenses associated with that injury and so the law of tort would also allow John to recover in civil law in respect of those injuries. In other words, what I am saying is just because there may well be a criminal remedy does not mean that there is no need for a civil remedy.

The Hon. DAVID CLARKE: But in both of the examples I have given, you have been able to think of a criminal or civil remedy available to the victim against the perpetrator?

Mr SANTOW: But neither of them necessarily provides adequate protection. So in respect of the second example, the law of breach of confidence, when you actually analyse that case law, it is developed in a way that sometimes provides protection and sometimes does not. From a privacy perspective the problem is that what it is trying to do is not protect what is fundamentally at stake here, which is the privacy of the individual. It is trying to protect something else.

Mr DAVID SHOEBRIDGE: And if the only damage in that second one was distress and anxiety, it is very likely that the current tort would not apply because they cannot prove damage?

Mr SANTOW: The tort of breach of confidence, that is correct.

The Hon. DAVID CLARKE: The disclosure of a student's university grades by an employee of the university to her ex-husband—could you think of any civil or criminal remedy available to the victim there?

Mr SANTOW: I think in respect of all of the examples that you have given—I know this is a very lawyerly answer—there are some potential causes of action but what we know and what the Australian Law Reform Commission and the New South Wales Law Reform Commission, among others, have been absolutely clear on is that those potential causes of action are not well calibrated for those sorts of situations. There may be some situations where our law bends itself quite appropriately to give people some measure of justice.

The Hon. DAVID CLARKE: So you would agree that there is a whole range of situations where there has been a breach of privacy where there is already existing in one part of the law or the other a criminal or civil remedy?

Mr SANTOW: I strongly admire your glass half-full approach. That is certainly true but that also leaves many situations where people are left with no remedy at all or left with a very inadequate remedy.

The Hon. DAVID CLARKE: But it might be a very adequate remedy in some situations and there might be some where it is not? It is just something that we have to take into account.

Mr SANTOW: And from the perspective of a defendant it may be that some people are overcompensated because there is reliance on another cause of action that is essentially too generous to the plaintiff but the problem that you get when you try to fit square pegs in round holes is that if the law tries to bend too far it can come up with results that are essentially problematic.

Mr DAVID SHOEBRIDGE: I am not suggesting there would be a public interest in those cases but where a defendant may assert a public interest for the disclosure of some private information the current tortious remedies just ignore that. It has no part to play, does it, in the current law of tort?

Mr SANTOW: That is correct. Essentially with privacy, as we well know, there are multiple rights and interests at stake. That is why, as I said in my opening remarks, a carefully calibrated statutory cause of action that allows the consideration of those competing rights and interests is far preferable to what we currently have.

Mr DAVID SHOEBRIDGE: The NSW Law Reform Commission recommended that if Parliament enacted a statutory remedy, as part of that they should also legislatively remove any parallel tortious remedies. The tort of breach of confidence has a lot of good work to do—in fact, most of the good work it does is outside the realm of privacy—and we would need to be very careful if we abolished torts when we enacted a privacy remedy, would we not?

Mr SANTOW: The whole reason for there being a breach of confidence, at least in its genesis, is quite separate from privacy. It would be very important to make sure that any consequential legislative amendment would preserve the very important work that breach of confidence does.

Mr DAVID SHOEBRIDGE: Should we endeavour to do that at all or should we believe the tort law will develop and may go in a good or bad direction but it is primarily not to do with privacy so we should just get on with working out a code for privacy?

Ms FARTHING: There is an ad hoc and very uncertain approach that is being taken in the courts but I cannot see any reason why in legislation you could not define what is abolished at the common law going forward.

The Hon. DANIEL MOOKHEY: Generally the way we extinguish torts is not to extinguish the whole of them but the parts of them we do not want to keep.

Ms FARTHING: That is correct, to give certainty going forward about what will apply in which situation.

Mr DAVID SHOEBRIDGE: I can see a clear argument for saying if you have recovered under a statutory remedy then that extinguishes your rights for recovery under any alternative tortious remedy. That seems like a sensible provision, but it is quite different to abolish the tortious remedy entirely.

Mr SANTOW: I do not think there was any suggestion that the New South Wales Parliament would seek to abolish the common law breach of confidence tort.

Mr DAVID SHOEBRIDGE: Should we do it in the method I was suggesting: If you seek a statutory remedy then that prohibits you from bringing a common law remedy?

Mr SANTOW: Yes.

The Hon. DANIEL MOOKHEY: On page 15 of your submission, you speak about ensuring access to justice which, amongst other things, you say should be around costs, which I understand. Do you have any further detail on the concept of class actions for privacy breaches in respect of this tort? Obviously it would have to apply to any class of people who have been breached in the identical way. Do you think that would be used?

Mr DAVID SHOEBRIDGE: For example a group of youths suing the NSW police or that sort of thing.

The Hon. DANIEL MOOKHEY: Is that what you mean about a class action which can attract litigation funding?

Mr SANTOW: For an organisation that exists to protect the basic rights of disadvantaged people, we do very rarely take on a class action but it is usually a measure of last resort. However, it can be an economically efficient means of ensuring that a large number of disadvantaged people are able to obtain justice, particularly where the issue at stake is not primarily a financial one—in other words, if each individual who is affected in a particular situation wants alternative non-financial remedies such as a takedown notice and there

may be only a small amount of financial compensation. Our justice system is such that it may be financially impossible for them to take the matter individually but if enough of them take it together you could have it resolved more efficiently. On the whole, that is unlikely to take place.

The Hon. LYNDA VOLTZ: It could be up-the-skirt photography with a large number of complainants. Is that the kind of thing you are thinking about?

Mr SANTOW: That is a possibility.

Ms FARTHING: Probably an example that is easy to get your head around in terms of negligence being included are big data breaches, such as the disclosure of psychiatric records online. That is where you would see a class of similarly affected people who would have an expectation of privacy.

Mr DAVID SHOEBRIDGE: Would the existing provisions for class actions in the Supreme Court and Federal Court cover it? Would there be a need for anything special for privacy?

Mr SANTOW: We would need to turn our mind to that more specifically. In a similar area, discrimination, it is very difficult to bring a class action and there are some particular statutory obstacles we would not want to see imposed in any statutory cause of action for privacy.

The Hon. DANIEL MOOKHEY: One thing we explored was non-judicial tribunals to act as a form of jurisdiction. You called for the Privacy Commissioner to be able to initiate a complaint. Do you have views on whether the commissioner should be able to access determinative powers? Should NCAT have its role beefed up in this respect? Other than from a resource perspective, do you have any views on that?

Ms FARTHING: We are open to and supportive of a complaints process. PIAC is keenly aware of all of the obstacles to justice. If you just have a litigious remedy that is going to exclude a lot of people you now have insurmountable access to justice. One thing I would say, is you were considering creating a complaints process for the NSW Privacy Commissioner to conciliate complaints there should be proper resourcing for that. We only need to look to the Commissioner's latest annual report to see the criticism she has about resourcing issues for her office. In other jurisdictions where review processes have been set up and underresourced there have been frustrations. Yes, it makes sense to have a complaints process particularly for clients like ours but there needs to be adequate support and it needs to be properly set up and resourced.

Mr DAVID SHOEBRIDGE: People have spoken about having three branches available: first, complaint to the Privacy Commissioner, hopefully adequately resourced to deal with complaints and with some determinative powers; second, going to NCAT for a low-cost adjudicative remedy; third, leaving open the opportunity to go to a court of competent jurisdiction. Would you support having all three avenues available?

Ms FARTHING: Yes, we would. We do not support having it made a compulsory process that you must go here first before you go there. With the nature of privacy invasion being individualised, the option should be available to complainants to take the course of action they want to pursue. That could be set up in any legislative framework you come up with.

The Hon. DANIEL MOOKHEY: Currently, NCAT has restricted damages, with a $40,000 threshold, and the other branches are also restricted so if you want more serious remedies you have to go to court. Do you think NCAT's threshold is too low or too high?

Mr DAVID SHOEBRIDGE: That is NCAT in the PPIPA and HRIPA as opposed to a proposal in the jurisdiction in a new privacy tort.

Ms FARTHING: It is not something that we have formed a view on, whether it is bad or good. We do not have a view on whether it should be increased or decreased.

Mr SANTOW: There is a danger in focusing too much on the financial remedy whereas in reality people who have suffered a breach of privacy may be more interested in other remedies to put them in the position they would otherwise have been in had their privacy not been breached.

Mr DAVID SHOEBRIDGE: Which is why you support the array of remedies the Australian Law Reform Commission is suggesting.

Mr SANTOW: That is correct.

Mr DAVID SHOEBRIDGE: If we do nothing other than recommend that the Australian Law Reform Commission's draft bill has been road tested and supported by two Federal Law Reform Commission reports, a New South Wales report and a Victorian Law Reform Commission report—some people want negligence in it, some people do not; some people question the seriousness, some people do not—and we should just legislate for that in New South Wales and get the ball rolling on national privacy torts, would that be a good outcome?

Mr SANTOW: I think that would be preferable to the current situation. As regards the Commonwealth versus New South Wales legislatures enacting a privacy cause of action, we take a fairly pragmatic approach. If the New South Wales Parliament were worried that in due course there may be two statutory causes of action, there would be open to you some fairly simple means to deal with that. For example, you could have a sunset clause in the legislation requiring the legislation to be revisited or a compulsory review process triggered if Commonwealth legislation were passed to create a statutory causation.

Mr DAVID SHOEBRIDGE: Essentially what we do not need is yet another report saying we should act. Do we need some laws to put some teeth in our privacy protections?

Mr SANTOW: It has been one of the most reviewed areas of law over the last decade.

Mr DAVID SHOEBRIDGE: And every review said the same thing.

Mr SANTOW: Yes, that is right.

The Hon. DAVID CLARKE: Do you see any defects in the Australian Law Reform Commission's draft?

Ms FARTHING: There are two main differences. PIAC is generally supportive of how the statutory cause of action has been set up. We have mentioned the two main differences: first, in terms of the current negligence Act and second, in relation to the public interest and where that is taken into consideration. PIAC's position is it should be one of the defences and it is more appropriate for it to be there. The Australian Law Reform Commission has incorporated it within the cause of action, but other than that we are definitely supportive.

The Hon. DAVID CLARKE: No other reservations?

Ms FARTHING: Not off the top of my head.

The Hon. DAVID CLARKE: But you are not giving carte blanche for the Australian Law Reform Commission's report either. You have reservations about that and other people have reservations. What do we do?

Mr SANTOW: We are broadly in support of the enactment of a statutory cause of action along the lines of the ALRC. Based on our experience we are offering some refinements or improvements that would take a good model and make it better. But we have to remind ourselves: What are we comparing? We are comparing a current situation where there is no legislative protection with various models that would all be preferable to the current situation.

The Hon. DAVID CLARKE: But all of them imperfect in some way, in your view?

Mr SANTOW: It is hard to point to any legislation that is absolutely perfect.

The Hon. LYNDA VOLTZ: It is a matter of degree on how far you go. One piece of legislation goes so far; your suggestion goes a bit further. It is a matter of where to draw the line. Is that right?

Mr SANTOW: Yes, as I say for us the most useful way of looking at it is comparing the actual options before us. Doing nothing is significantly worse than the main orthodox legislative proposals before this Committee.

The Hon. DAVID CLARKE: Say we want some statutory provisions and so we are over that hurdle. Where to from there?

Mr SANTOW: I guess we would urge you to start with the statutory cause of action that the ALRC has proposed and make refinements based precisely on those set out in our submission. My colleague Ms Farthing has set out the key areas in which we think there are improvements to be made on the ALRC's proposal.

Mr DAVID SHOEBRIDGE: If you had a choice and you could wake up tomorrow and have the current state of play in New South Wales or have the Government enact the Australian Law Reform Commission's draft bill in its entirety as applying to New South Wales, what would your choice be?

Ms FARTHING: I think it is quite clear that we would like a statutory cause of action.

Mr DAVID SHOEBRIDGE: You have no difficulty in coming to that conclusion. Would it be a vast improvement?

Ms FARTHING: Yes. We think it would provide certainty. We think it would provide remedies where currently there are no remedies. It would provide a change in the social norms around privacy, as we have already discussed. It may not be perfect and—

The Hon. DAVID CLARKE: It is not your first choice, is it?

Ms FARTHING: If you go through—

The Hon. DAVID CLARKE: It is a model that you would like to build on.

Ms FARTHING: There are only two key examples, which I have given, where there are changes that we would like to see.

The Hon. DAVID CLARKE: They are significant.

Ms FARTHING: They are significant, but when you look at the elements of the cause of action, we are supportive of that. I did a detailed comparison of all the work that we have done in this area and what the Law Reform Commission has recommended, and there is a lot that we support. I do not think you would ever be able to ask a lawyer—particularly a lawyer from an organisation like the Public Interest Advocacy Centre [PIAC]—and get the answer, "Yes, we agree wholeheartedly," with a particular proposal. We think the benefit of what the Australian Law Reform Commission has done is in the very detailed legal thinking and public consultation. They have come up with something that we think is sensible and that would definitely be of benefit to New South Wales society. So we certainly do support it. If we had an option, waking up tomorrow, we would like a statutory cause of action. We think that would be of great benefit and provide a lot of clarity and certainty.

Mr DAVID SHOEBRIDGE: They have baked the cake and your submission talks about the colour of the icing. Would that be a fair summary?

The Hon. LYNDA VOLTZ: PIAC wants to put icing on it.

Ms FARTHING: We might want to change one of the flavours.

Mr DAVID SHOEBRIDGE: We are in the same area.

Ms FARTHING: Yes.

The Hon. LYNDA VOLTZ: But you would like cake?

Ms FARTHING: Always.

The Hon. DAVID CLARKE: It is not just about the icing.

Ms FARTHING: I think we can only go back to what we said at the beginning of our submission—as Mr Santow has said, it has been considered by very experienced legal minds. We support putting into force the recommendations that have been made. We may quibble on some of the issues—

The Hon. DAVID CLARKE: Some important issues.

Ms FARTHING: —but we would certainly like to wake up tomorrow with a statutory cause of action for breach of privacy.

Mr DAVID SHOEBRIDGE: You do not want another report; you want a law.

CHAIR: Thank you very much. Unfortunately time has expired for questions.

(The witnesses withdrew)

The Committee adjourned at 2.31 p.m.

IN CAMERA **PROCEEDINGS BEFORE**

STANDING COMMITTEE ON LAW AND JUSTICE

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

_____

At Sydney on Monday 16 November 2015

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The Committee met in camera at 2.37 p.m.

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PRESENT

The Hon. N. Maclaren-Jones (Chair)

The Hon. D. Clarke
The Hon. D. Mookhey
Mr D. M. Shoebridge
The Hon. B. Taylor
The Hon. L. Voltz

Evidence in camera by **WITNESS A**, on former oath:

CHAIR: The Privacy Commissioner is joining us.

Mr DAVID SHOEBRIDGE: You are comfortable with that? Is that your preference?

WITNESS A: Absolutely. I am pleased.

CHAIR: You wanted to reappear in order to place some more things on the record. I am more than happy just to hand over to you to make an opening statement and comments.

WITNESS A: I read the first three paragraphs of my opening statement from last time and I thought that was rather profound so I will not emulate that. For the benefit of Mr Mookhey, on 19 December last year I was having surgery with my legs in stirrups. The nurse who was looking after me apparently took a photograph of my lower body and my genitals, and apparently then shared it with two of her colleagues. I believe I was privy to one of those showings in the recovery room. I remember waking up crying. I thought I was silly but I think it was probably my subconscious telling me something, because I have not cried before when I was woken up from surgery.

I remember looking across the room and seeing two nurses looking at a mobile phone. One of the nurses was screaming, "No, no." I thought to myself, "This is an interesting place to work, and what the hell is that mobile phone doing in the recovery room!" I thought nothing of it for a couple of months. Five weeks later I was contacted by my gynaecologist and advised that the incident had taken place. Since then I have learnt a lot about what can and cannot be done. I think the most valuable thing I have learnt is not to call in a solicitor straight away because it took many months for the hospital to give me viable information. I am a teacher [redacted].

I look after [redacted], and I give advice daily. I knew, from being in that role, and as well as my role as [redacted] teacher, just how fantastic a situation I had landed in without choosing to do so. Unfortunately, being the great thinker that I am, I started to see all the scenarios that could unfold. I started looking online and trying to find others. There was none. That is probably because most of them took pay-outs. This morning I learnt of another case. I was speaking with a solicitor who told me about another case. The case is the same as mine in that the person cannot get any remedies or any justice because the laws do not exist.

Mr DAVID SHOEBRIDGE: What was that case?

WITNESS A: In an operating theatre a surgeon took photographs without prior permission. The surgeon showed them to the patient, who got very upset. Whilst in this case there was no publication, there was certainly no consent for those photos to have been taken. In my case I have seen the photo. The nurse said that she had deleted the photo. She has done what she said she had done; nonetheless, when you take a photograph it is forever. You might delete it but it can be retrieved. I have to live with that for the rest of my life. I know that it is locked up in the forensic lab but I have to live with the knowledge that that image exists. There is not much else I can do.

Mr DAVID SHOEBRIDGE: Did this other case occur in New South Wales?

WITNESS A: I am not sure. I only became aware of it this morning.

Mr DAVID SHOEBRIDGE: If you get any further details, could you provide them to us?

WITNESS A: I have asked the solicitor to give them my details because I am sure that they are feeling immensely worried.

The Hon. LYNDA VOLTZ: One of the biggest problems for you was overcoming the knowledge that something was happening but not knowing how to retrieve the information.

WITNESS A: It was. Initially I made contact with police. It took some weeks for them to figure out what they were going to do—which was to have me come in and make a statement. They then went and spoke

only to the two nurses who were shown the photo. The nurse who took the photo was never interviewed, nor were the other people in the operating theatre at the time the photo was taken. The metadata and the image give me an exact time and direct location, and the image that I saw shows that a flash was used. In the image two-thirds is definitely me, but there is a dark space above. At this point in time they are unable to ascertain whether there are any people in the background.

When I went under, there were three men in the room. There was the anaesthetist and what I presume were two orderlies. The orderlies were male. I have no information about who they were and what they did to stop this or to report it. After seeing the photograph and knowing that a flash was used, I am pretty sure that it would have been hard to miss in a room filled with surgical equipment that is reflective. I have accepted it. I have no other choice.

The process has been really long. A lot of the time I have felt as if I have had to climb brick walls. I have come up against a lot of opposition. I have had to completely ignore the legalistic behaviour shown towards me in the form of letters and the single meeting that I have had with the hospital and their insurance company's solicitors. I have had to switch off from their need to protect themselves. All I really wanted was basic information. The last thing that I talked about with the people in the room before I went under the anaesthetic was where I worked and what I did for a living. They said, "We live there," and "I am in that area, in [redacted]."

I was trying to dehumanise it. I knew what those people were there for. That has probably provided the most torment. I found out five weeks after my operation what had happened. I then had a week to process the information before I went back to school after the school holidays. The first day I went back wondering whether her children or her children's friends were in my classes and who had seen what? There was no control. All I had been told was that the nurse had said she had deleted the photo. That was all I had.

Mr DAVID SHOEBRIDGE: One of the things that I get from your story is that what is needed in a case like yours is an immediate remedy that at least gives you all the information straightaway. What happened, when it happened, who did it and how did happen—you should have a right to that information straightaway. Is that what you are saying?

WITNESS A: Absolutely. It was many weeks before I found out her name, and that was only because someone breached privacy. I only got that information because they breached privacy.

Mr DAVID SHOEBRIDGE: The only way you could find information about the breach of your privacy was for somebody else to have a breach of privacy.

WITNESS A: Yes.

Mr DAVID SHOEBRIDGE: That is ironic.

WITNESS A: Yes, it is. I have had to be extremely ethical about what information I have released.

CHAIR: I read in your submission that you went to the Health Care Complaints Commission [HCCC].

WITNESS A: I did.

CHAIR: What happened with that process? Has it been investigated by the commissioner?

WITNESS A: In May I got fed up with waiting for the hospital to tell me what to do. They had told me that they would make a complaint. I very naïvely assumed that they would tell me when they were making a complaint. I naïvely believed that they would write to me to let me know that they had made a complaint. I got cranky one day and rang the HCCC. The hospital was not speaking with me. I told the HCCC that I wanted to find out whether a complaint had been made. They were able to tell me that a complaint had been made. They asked who I was. I explained who I was. Then they clammed up.

At that stage I was horrified to discover that they had closed the investigation and forwarded it to the Nursing and Midwifery Council. That was all the information they could give me. They suggested that I contact the Nursing and Midwifery Council. I hung up. I rang back about five minutes later. They did not want to talk to me. They knew who I was. I said that I wanted a case number.

Mr DAVID SHOEBRIDGE: This the Nursing and Midwifery Council?

WITNESS A: No, the HCCC. It was gut-wrenching to find out that the complaint had been made. All I needed was a bit of information so that I would know that they had done what they were supposed to do.

Mr DAVID SHOEBRIDGE: Did they ever contact you in the course of that complaint?

WITNESS A: The HCCC contacted me only after I complained to the Nursing and Midwifery Council. I rang the Nursing and Midwifery Council straightaway. They were fantastic. They told me how to handle it. I wish that I had rung them on day one. I made my complaint. They wrote to me and told me that a copy of my complaint would be given to the nurse and I had to accept that. I did.

It then took about three months of their time to process that. I rang them a couple of times to ask how it was going. In my complaint I said that I wanted a face-to-face meeting. I think I deserve that much. I wanted a forensic examination of the telephone so that I could be sure that the photo would not come back and haunt me. That was really all I needed. They said they could not do that. They could not ask the nurse to surrender the phone. They never addressed the issue of the face-to-face meeting. I have never received a formal apology. All I have is a one-line statement, a statutory declaration saying that she deleted the photo on 17 December, not 19 December.

The Hon. DANIEL MOOKHEY: The practical consequence of the absence of a privacy remedy is that you have had to pursue it as a breach of professional standards.

WITNESS A: Once I realised that the police could not do anything, I had to make sure that the processes were followed. I was completely unaware of them. I am a regular citizen. There was nothing out there that I could find or anything in the hospital documentation that tells you who to contact when something goes wrong. They tell you to contact them, in their privacy policy.

Mr DAVID SHOEBRIDGE: Those remedies are not focused on fixing you. They are focused on punishing their health professionals for breaches of the code.

WITNESS A: They did not even handle the issue of a phone being there. That phone is a telecommunications device. It has iCloud on it even if it is not switched on. As I discovered, if a photo goes up to the cloud, even if you have deleted it the photo still sits on the phone in the deleted images area until the data in that area is overwritten. The image has been uplifted from the phone to the cloud.

The Hon. DANIEL MOOKHEY: That is before you get to backups. Forgive me if you covered this in your earlier evidence; I was not present for that. Did the hospital sanction the nurse? Was she subject to any employment sanctions?

WITNESS A: They dismissed her.

The Hon. DANIEL MOOKHEY: She presumably is free to be re-employed elsewhere.

WITNESS A: I know where she works.

CHAIR: Did the Nursing and Midwifery Board impose any restrictions on her? Has any action been taken from the point of view that, as a nurse, she has a responsibility to protect her patient?

WITNESS A: They were unable to do anything other than put her through a reflection activity before a board, to explain herself. She apparently has expressed suitable remorse and has shown empathy towards my situation. I still do not have a letter and have not had a face-to-face meeting.

Mr DAVID SHOEBRIDGE: If you had been able to approach the Privacy Commissioner and make a complaint, and if the Privacy Commissioner had the power to compel the production of records immediately, and force the nurse and the hospital into conciliation within a matter of weeks, would that have minimised the distress and put you on a more positive path than the one you have gone down?

WITNESS A: Absolutely. I would have had some control. I have not had control for a very long time. I have had some control in the last week. My main concern was getting control of the image. No-one could categorically tell me that that image was contained.

Mr DAVID SHOEBRIDGE: This breach having happened, if you had a choice of avenues for seeking some redress, would you want to find yourself in the Supreme Court, against the hospital and the nurse?

WITNESS A: I have chosen not to do that.

Mr DAVID SHOEBRIDGE: Or would you want to find yourself at a low-cost administrative tribunal or a conciliation overseen by the Privacy Commissioner?

WITNESS A: I do not want to be in court at all. There should be very clear guidelines on this sort of situation. If I had been in a change room at a swimming pool and someone had taken a photo of me, it would be the same situation. If I had been having a Brazilian in a waxing salon, it would be the same situation. Even if we make it apply only to professional industries such as health care or teaching, as a person who has had to go through this I would not want to pursue it through the courts. I would be happy knowing that someone else was going to the police.

I still cannot believe that the police could not go and get the phone. I thought there would be a law to allow them to break down the door and say, "Give us your phone. Give us your devices. Give us your passwords and come with us, please." Everyone I have talked to about this believes it is criminal. They just assumed it was criminal. It should be. That is what the community expects. I have nearly 6½ thousand signatures on my petition that I have been forced to create. Overwhelming, the comments on the petition are: "I cannot believe that this is legal. We need to criminalise this now." I am not expecting the nurse to be thrown into jail. I know that will not happen in my situation. What horrifies me the most is that she is still working in operating theatres. She is still out there. I have had to write to that hospital to say how worried I am. What peril does that place me in?

CHAIR: I reiterate the Committee's appreciation to you for coming forward. It is difficult to find witnesses who are willing to speak on such an issue. A number of individuals have not had the courage to come forward. We appreciate that you have given your evidence and been open about what has happened to you and the process that you have gone through. Thank you very much for taking the time to come back and give evidence in camera. That concludes the Committee's hearing for today.

WITNESS A: Thank you, everyone. I appreciate you listening.

CHAIR: Thank you.

(The witness withdrew)

The Committee adjourned at 2.57 p m.