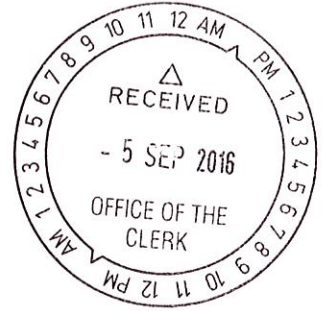




**The Hon Gabrielle Upton MP**  
Attorney General



Mr David Blunt  
Clerk of the Parliaments and  
Clerk of the Legislative Council  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000

A615349

Dear Mr Blunt

Please find enclosed the NSW Government response to the recommendations of the Standing Committee on Law and Justice's report entitled *Remedies for the Serious Invasion of Privacy in New South Wales* published on 3 March 2016.

In accordance with Standing Order 303A, I am required to report to the House what action the Government proposes to take in relation to each recommendation of the Committee. Standing Order 303A also provides that I may present the response to the Clerk if the House is not sitting and the response is deemed to have been tabled and printed.

Yours sincerely

**GABRIELLE UPTON MP**  
Attorney General

Received by me at  
12 noon on Monday  
5 September 2016 and  
authorised to be printed

  
for  
Clerk of the Parliaments



## **NSW Government response to the Legislative Council Standing Committee on Law and Justice's report into *Remedies for the serious invasion of privacy in New South Wales***

The NSW Government acknowledges the work of the Legislative Council Standing Committee on Law and Justice (**LC Committee**) in producing its report, *Remedies for the serious invasion of privacy in New South Wales*, on 3 March 2016 and the particular focus of the inquiry on the non-consensual sharing of intimate images, commonly referred to as 'revenge porn'.<sup>1</sup>

The Government has carefully considered the recommendations of the LC Committee, including the recommendation that the Government introduce a statutory cause of action for serious invasions of privacy.

The Government acknowledges the evidence received by the LC Committee's inquiry in relation to the severe impact that the non-consensual sharing of intimate images can have on victims, particularly in the context of domestic violence and abuse. The Government considers the most effective way to address this harm is by reviewing and amending the criminal law to deter the offensive behaviour, rather than introducing a new statutory cause of action for serious invasions of privacy.

The introduction of new criminal offences was beyond the LC Committee's remit for its inquiry. However, the LC Committee's report acknowledges the support from inquiry participants for new criminal offences and notes it would be appropriate for the Government to consider the recommendation of the Senate Legal and Constitutional Affairs References Committee (**Senate Committee**) in its February 2016 report, *Phenomenon colloquially referred to as 'revenge porn'* to the effect that all Australian jurisdictions should introduce criminal offences responding to this issue.

The Government will consult with stakeholders on the terms of new criminal offences and how they might be framed to ensure NSW criminal law adequately protects people from the harm caused by the non-consensual sharing of intimate images.

The scope and effect of a statutory cause of action for serious invasions of privacy in NSW, particularly in the absence of a national approach, is uncertain. However, the Government recognises there is a level of community concern about serious invasions of privacy and, in addition to considering new criminal offences, will explore the proposal for a statutory cause of action further with other Australian jurisdictions.

The Government's response to each of the LC Committee's recommendations is set out below.

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<sup>1</sup> In accordance with the recommendation of the Senate Legal and Constitutional Affairs References Committee in its February 2016 report, *Phenomenon colloquially referred to as revenge porn*, the phrase 'non-consensual sharing of intimate images' is used in this response to refer to the behaviour commonly known as revenge porn.



LC Committee Recommendation	NSW Government Response
<p><b>Recommendation 1</b></p> <p>That the NSW Police Force: a) ensure that its officers receive training in the harms associated with technology-facilitated stalking, abuse and harassment; and b) that the training incorporate education about how existing offences and other orders, such as apprehended violence orders, could be used in respect of allegations of that nature.</p>	<p><b>Support</b></p> <p>The NSW Police Force is responsible for the training of its officers.</p> <p>The NSW Police Force already provides training on these matters for officers dealing with domestic violence matters and youth cybercrime.</p> <p>There is also general training for officers in relation to harms associated with technology-facilitated stalking, abuse and harassment, and education about how offences and other orders may be used to address allegations of this nature.</p> <p>If new criminal offences are introduced, the NSW Police Force has advised that it would roll out appropriate training packages to police more generally.</p>
<p><b>Recommendation 2</b></p> <p>That the NSW Government undertake a statutory review of the <i>Crimes (Domestic and Personal Violence) Act 2007</i> to consider additional potential remedies available to the Local Court to protect the privacy of individuals who have been or are seeking to be safeguarded by apprehended domestic violence orders.</p>	<p><b>Support</b></p> <p>The Government recently finalised and tabled in Parliament (on 4 May 2016) a statutory review of the <i>Crimes (Domestic and Personal Violence) Act 2007 (CDPV Act)</i>. The review was comprehensive and involved extensive stakeholder consultation.</p> <p>The review concluded the policy objectives of the CDPV Act remain valid and its terms generally remain appropriate for securing those objectives.</p> <p>Legislation (<i>Crimes (Domestic and Personal Violence) Amendment (Review) Act 2016</i>) to implement all 17 recommendations of that review received assent on 28 June 2016.</p> <p>In giving effect to the recommendations of the statutory review, the amending legislation expands the availability of apprehended domestic violence order (ADVO) and provides the NSW Police Force and courts with even greater flexibility in the ADVO process to ensure they can offer the best possible protection and support to victims.</p> <p>In particular, the amending legislation will allow the Local Court (which hears ADVO applications) to impose new conditions on an ADVO which prohibit a defendant from locating or attempting to locate a victim. Such</p>

LC Committee Recommendation	NSW Government Response
<p><b>Recommendation 3</b></p> <p>That the NSW Government introduce a statutory cause of action for serious invasions of privacy.</p>	<p>conditions could be used to protect a victim's privacy by, e.g., prohibiting the use of location tracking mobile phone applications by a defendant.</p> <p>The Government will continue to monitor this area to ensure that the law is responsive to the needs of victims of domestic violence.</p> <p><b>Noted</b></p> <p>The Federal Government has publicly confirmed it does not support a tort of privacy and no other Australian jurisdiction has indicated a willingness to take steps in this direction. NSW cannot act alone in the absence of an agreed approach at a national level. Modern technology (such as social media and mobile phones), as well as cross-jurisdictional ownership of media organisations, mean breaches of privacy are rarely limited by physical jurisdictional boundaries. For this reason, in its comprehensive examination of the issue in 2010 and 2014, the Australian Law Reform Commission (<b>ALRC</b>) concluded a state based regulatory approach would not be effective.<sup>2</sup></p> <p>A lack of national uniformity would be likely to lead to inconsistency and complexity and increased costs for legitimate NSW business activities compared to their competitors in other states. There would also be a risk of forum shopping, which would impose costs on the NSW justice sector as people initiate proceedings from outside the state, with no benefits for the NSW population.</p> <p>Protection of privacy also needs to be carefully balanced with freedom of expression. The public interest in the free flow of information on matters of public concern and freedom of artistic expression could be threatened by unclear standards as to what is and what is not acceptable in the context of a statutory cause of action for serious invasions of privacy.</p> <p>Further, as the social media environment is constantly evolving (and</p>

<sup>2</sup> ALRC, *Serious Invasions of Privacy in the Digital Era*, ALRC Report 123, June 2014; ALRC, *For Your Information: Australian Privacy Law and Practice*, ALRC Report 108, August 2008.



## LC Committee Recommendation

## NSW Government Response

engagement with technology varies considerably across generations and cultures) codifying what is meant by a person's reasonable expectation of privacy with sufficient certainty is problematic. The impact of a new statutory cause of action on legitimate business activities – by increased legal risk and compliance (particularly for small businesses, which are not covered by state or federal privacy legislation) – cannot be assessed. It is undesirable to enact a new cause of action without a clear view of the effects on legitimate business activities.

Despite these barriers, the Government acknowledges the underlying community concerns about privacy that have prompted the LC Committee to recommend the introduction of a statutory cause of action and the long history of this proposal. Accordingly, the NSW Department of Justice will initiate discussions with other Australian jurisdictions to explore views on this issue.

At this time, in the Government's view, a more effective way of dealing with the LC Committee's key concern – the non-consensual sharing of intimate images – is by introducing new criminal offences in NSW. The evidence presented to the LC Committee suggests the gap in coverage for the scenarios involving the non-consensual sharing of intimate images would be better addressed by amending the criminal law in NSW to deter the particular behaviour, as recommended by the Senate Committee. A response that does not place the burden on individuals to actively pursue a complicated legal remedy (as would be required under a statutory action for serious invasions of privacy) is a more precise way to target and provide a solution to this particular gap in privacy protection. Criminal remedies also send a strong public message that this behaviour is unacceptable.

The Government is considering the introduction of new criminal offences against non-consensual sharing of intimate images. The Government will consult with stakeholders on the terms of the proposed new criminal offences and how they might be framed to ensure NSW criminal law adequately protects people from the harm caused by the non-consensual sharing of intimate images.

LC Committee Recommendation	NSW Government Response
<p><b>Recommendation 4</b></p> <p>That in establishing the statutory cause of action at recommendation 3, the NSW Government base the action on the Australian Law Reform Commission model, detailed in its 2014 report, <i>Serious Invasions of Privacy in the Digital Era</i>.</p>	<p><b>Noted</b></p> <p>Recommendation 4 relates to the structure of a statutory cause of action for serious invasions of privacy. The Government does not make any further response in relation to this recommendation at this time, but will consider the recommendation further in light of the outcome of discussions with other jurisdictions (as noted above).</p>
<p><b>Recommendation 5</b></p> <p>That in establishing the statutory cause of action at recommendation 3, the NSW Government should consider incorporating a fault element of intent, recklessness and negligence for governments and corporations, and a fault element of intent and recklessness for natural persons.</p>	<p><b>Noted</b></p> <p>Recommendation 5 relates to the structure of a statutory cause of action for serious invasions of privacy. The Government does not make any further response in relation to this recommendation at this time, but will consider the recommendation further in light of the outcome of discussions with other jurisdictions (as noted above).</p>
<p><b>Recommendation 6</b></p> <p>That the NSW Government:</p> <ol style="list-style-type: none"> <li>a) broaden the scope of the NSW Privacy Commissioner's jurisdiction to enable the Commissioner to hear complaints between individuals relating to alleged serious invasions of privacy;</li> <li>b) empower the NSW Privacy Commissioner to make determinations that involve non-financial forms of redress, including apologies, take down orders and cease and desist orders</li> <li>c) ensure that the NSW Privacy Commissioner is empowered to refer a complaint on behalf of a complainant to the NSW Civil and Administrative Tribunal for hearing for a statutory cause of action where there is a failure to act on a non-financial form of redress, including apologies, take down orders and cease and desist orders, and</li> <li>d) ensure that the Office of the NSW Privacy Commissioner is adequately resourced to enable it to fulfil its functions arising from the expanded scope to deal with complaints arising from alleged serious invasions of privacy.</li> </ol>	<p><b>Noted</b></p> <p>Recommendation 6 relates to the structure of a statutory cause of action for serious invasions of privacy. The Government does not make any further response in relation to this recommendation at this time, but will consider the recommendation further in light of the outcome of discussions with other jurisdictions (as noted above).</p>



LC Committee Recommendation	NSW Government Response
<p><b>Recommendation 7</b></p> <p>That the NSW Government confer jurisdiction on the NSW Civil and Administrative Tribunal to enable it to hear claims (in addition to ordinary civil courts) arising out of the statutory cause of action for serious invasions of privacy at recommendation 3.</p>	<p><b>Noted</b></p> <p>Recommendation 7 relates to the structure of a statutory cause of action for serious invasions of privacy. The Government does not make any further response in relation to this recommendation at this time, but will consider the recommendation further in light of the outcome of discussions with other jurisdictions (as noted above).</p>