

NSW Government response to the Legislative Council report into *Remedies for the serious invasion of privacy in New South Wales*

Roger Walter | September 2016 | Insurance & Financial Services

In our TurkAlert of March 2016 we foreshadowed the publication of the NSW parliamentary report on proposals for amending the law to combat serious invasions of privacy. On March 3 2016 as scheduled, the report was issued with seven recommendations.

On 5 September 2016, as scheduled, the NSW Government issued its response to the report. In the response the Attorney General explained that while there is interest in amending the criminal law of NSW, there is at present no plan in NSW to introduce a statutory tort for serious invasions of privacy. Further progress on the reform of the civil law in the area will depend on a nationally coordinated approach, which seems to be some way off yet.

There was particular focus in the work done by the committee of the NSW Legislative Council responsible for the March 2016 report on the non-consensual sharing of intimate images – a phenomenon known as ‘revenge porn’ and one often associated with domestic violence and abuse.

The Government has expressed the view in its response to the report that behaviour of this sort will most effectively be addressed by the additional deterrence that might be derived from review and amendment of the criminal law.

While the introduction of new criminal offences fell outside of the Legislative Council committee’s remit for the March 2016 report, the Government notes in its response that the February 2016 Senate committee report on the area provided support for all Australian

jurisdictions introducing relevant criminal offences to supplement existing offences.

The NSW Government now plans to ‘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.’

In recognition of the recommendations of the Legislative Council report and the concern across the community, the NSW Government also intends to explore the proposal for a statutory cause of action further with other Australian jurisdictions. Notably in this regard, the response by the NSW Government also records that 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.’

The particular reasons for the decision by the NSW Government not to act alone in legislating to introduce a tort of serious invasion of privacy are given in the response issued on 5 September 2016. Those reasons are centred upon the desire for a uniform national approach, which from a regulatory standpoint would be desirable so that the burden on media organisations and commerce generally can be minimised.

The recommendations made in the Legislative Council report of 3 March 2016 can be briefly summarised as follows – the first two recommendations have the NSW Government’s express support:

1. Ensure that the NSW Police Force undertakes training specific to the laws constituting the relevant offences and the effects of revenge porn and other similar forms of harassment.

2. That the NSW Government reviews the Crimes (*Domestic and Personal Violence*) Act 2007 and considers additional potential remedies available to the Local Court to protect the privacy of individuals in relation to apprehended domestic violence orders.
3. That the NSW Government introduces a statutory cause of action for serious invasions of privacy.
4. That the NSW Government bases the said statutory cause of action on the Australian Law Reform Commission model, as detailed in its 2014 report.
5. That the NSW Government in designing the said statutory cause of action 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.
6. That the NSW Government takes certain steps to broaden the scope of the NSW Privacy Commissioner's jurisdiction in relation to alleged serious invasions of privacy and relevantly adds to the powers of the NSW Privacy Commissioner to make certain determinations and provide certain remedies.
7. That the NSW Government confers jurisdiction on the NSW Civil and Administrative Tribunal to enable it to hear claims (in addition to ordinary civil courts) arising out of the proposed statutory cause of action for serious invasions of privacy.

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