Creepshots – A Persistent Difficulty in the Australian Privacy Landscape

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ABSTRACT

With the rise of smartphones and social media, individual privacy has become a major concern. One worrying trend involves the rise of 'creepshots', in which women in public are surreptitiously photographed or filmed, with the content later uploaded to online 'creeper' forums or communities for viewer's voyeuristic gratification. This article will demonstrate that creepshots are a complex issue for privacy law that requires a holistic analysis of the content of a creepshot, the manner and purpose of procurement and disclosure, and the detrimental impacts that creepshots have on the standards of respect and autonomy of women afforded by society. It is contended that the current legal recourse in Australia is insufficient in identifying and understanding these complexities and proposes for the creation of the Australian Law Reform Commission's recommended statutory cause of action for serious invasions of privacy in dealing with creepshots. Moreover, site moderators will need to be vigilant for any possible presence of creepshot communities on their digital platforms and should be tasked by way of a code of practice in deleting such content and suffocating the creepshot trend.

I INTRODUCTION

In the past decade, there has been a growing trend of non-consensual image taking and filming of women in public settings, with the content subsequently distributed onto online communities. This behaviour has been defined by these forums as the 'creepshot'. There have been numerous iterations of these forums or communities on the popular domain of Reddit, where upon entering, a user can find thousands of non-consensual, surreptitious photographs of women in public spaces.[1] The photographs are not sexually explicit, but sexually suggestive in that they focus upon the target's breasts, pubic area, buttocks, and legs.[2] Subjects are often wearing

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[1] Creepshots must be 'candid'. 'If a person is posing for and/or aware that a picture is being taken, it ceases to be a creepshot': MetaReddit, CreepShots <http://metareddit.com/r/CreepShots/>.

[2] Andrea Waling, 'Explainer: What Are 'Creepshots' and What Can We Do About Them?', *The Conversation* (online, 14 July 2017) <https://theconversation.com/explainer-what-are-creepshots-and-what-can-we-do-about-them-80807>; Radhika Sanghani, 'How Online Creeps Just Got Even Creepier', *The Telegraph* (online, 24 July 2014)

'tight' or 'revealing' clothing, but have also been pictured in ordinary clothing such as shirts or shorts.[3] Creepshots are taken in public spaces as it is commonly believed that subjects have no reasonable expectation of privacy in such areas.[4] These images contribute towards 'creepshot communities', where viewers can use these images for their sexual gratification.[5] Photos of minors and 'upskirts' are prohibited in these communities.[6] Women in these photos may be easily identifiable if their face or other distinguishable characteristics are shown. On the other hand, they may not be identifiable at all, or only identifiable by the subject themselves rather than to a widescale audience. This gives rise to issues of privacy not only to the aggrieved individual, but also the privacy and safety of women in broader society. Creepshot practices may be characterised as oppressive towards women, restricting their autonomy to dress and express themselves freely without fear of being documented in public. Such objectification only serves to diminish the respect and dignity of women in public and digital environments.

The existence of these forums has been persistent. Indeed, the site moderators of Reddit have already closed numerous threads of this nature on its own platform.[7] It is likely, however, that these communities will never fully disappear, and either already exist on another online domain, or will reappear in the near future. But the more contentious issue at hand is simply, is it illegal? MetaReddit/Creepshots, before its forced closure, believed it was not:

> There is nothing here that breaks any laws. When you are in public, you do not have a reasonable expectation of privacy. We kindly ask women to respect our right to admire your bodies and stop complaining.[8]

This article analyses the validity of this claim under the lens of Australian privacy law, particularly the phrase of 'reasonable expectation of privacy'. It is important to note, however, that given the North American origins of Reddit, this claim is likely in reference towards the 'reasonable expectation of privacy' test first articulated in *Katz v United States* ('*Katz*'),[9] which

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<http://www.telegraph.co.uk/women/womens-life/10987816/Creep-shot-Twitter-trend-how-creeps-just-got-creepier.html>; Katie Baker, 'Here's a New, Totally Legal Reddit Hub Devoted to Creep Shots', *Jezebel* (online, 27 June 2012) <https://jezebel.com/5921747/heres-a-new-totally-legal-reddit-hub-devoted-to-creep-shots>.

[3] Ibid.

[4] Ibid.

[5] Ibid.

[6] Ibid.

[7] For example, the following Reddit iterations have been banned in the past few years: r/CreepShots; r/CreepSquad; r/CreepyShots; r/CreepShots2; r/CreepShots3; r/CreepPhotos; r/CandidFashionPolice.

[8] Waling (n 2).

[9] *Katz v United States*, 389 US 347, 360–1 (1967). Per Harlan J: 'There is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and second, that the expectation be one that society is prepared to recognise as "reasonable"'.

stems from very different origins to Australian privacy law. Specifically, the *Katz* test is commonly used when considering possible violations of Fourth Amendment rights of the United States Constitution, which refers to the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures' by government agencies.[10]

While it is acknowledged there are differences between Australia, the United States, and other Western jurisdictions in privacy law foundations, such a discussion falls outside the scope of this article. Rather, the article's aim is to generate debate over the suitability of privacy theories in understanding the complexities of creepshots, and the sufficiency of the current Australian legal framework in providing recourse to this phenomenon. Part II will analyse traditional and contemporary privacy theories, as well as provide a normative framework most capable in identifying privacy concerns surrounding creepshots. Part III will critique the current Australian legal recourse for creepshot subjects. Part IV provides recommendations moving forward for the Australian privacy landscape. With the advent of mobile camera technology and an increased reliance on online media, there is now, more than ever, a pressing need for the Australian law to mobilise in combatting such trends.

II Normative Framework of Privacy Concerns with Creepshots

Creepshots are images captured in a public setting and their dissemination does not reveal secret, concealed, or intimate information. At first instance, it would appear that creepshots are not infringing upon one's privacy as the content of the information is not personal nor sensitive, nor are they taken in a private setting. However, it would be difficult to argue that creepshots are appropriate, as one would intuitively expect that being photographed in public, and its later online dissemination, should require some form of consent. Moreover, emotional distress would likely follow from knowing that an image of oneself is being viewed for sexual pleasure with worldwide access. Conventional privacy theories are helpful, in part, in comprehending the privacy issues associated with the creepshot trend. However, as this article demonstrates, these theories struggle to illuminate the root issues of creepshots because of their overly broad or reductive definitions.

Warren and Brandeis defined privacy as the 'right to be let alone', with the underlying principle of an 'inviolate personality'. They believed that the value of privacy is found in the peace of mind or relief afforded by the

[10] *United States Constitution* amend IV.

ability to prevent publication of personal information.[11] Building upon this foundation, Ruth Gavison conceptualised privacy as the 'limited access to self', positing that limited access is the common denominator of privacy, and that it is related to our concern over our accessibility to others. This includes the 'extent to which we are known to others, the extent to which others have physical access to us, and the extent to which we are the subject of others' attention'.[12] Further, Gavison provides that limited access can be delineated into three independent elements—secrecy, anonymity, and solitude. However, there are limitations in restricting privacy to matters of withdrawal (solitude) and concealment (secrecy and anonymity). In the context of creepshots, the collection, storage, and distribution of these images does not necessarily reveal secrets, destroy anonymity, or thwart solitude.[13] These images are taken exclusively in public settings, and the images are not sexually explicit in nature. Furthermore, many subjects are unidentifiable to a wider audience.

Indeed, this is exactly how the creepshot forums justify their behaviour, with the site's motto being 'no harm, no foul'—if women are none the wiser of these photos, nor are they identifiable, then no harm can flow. Yet, according to Sacha Molitorisz, even if there has not been any instrumental harm, there has been a foul.[14] Consent has not been sought for actions that intuitively require consent, and there has been a failure of respect. The women published on these websites, regardless of whether they are identifiable, are being treated as objects, or even commodities, given the profit-driven motives of website administrators.[15] Moreover, women who are aware of these forums may dress and act differently or may experience feelings of distress or anxiousness when in public.[16] However, individual privacy concerns and the discussion of one's ability to control when, how, and to what extent information about oneself is communicated to others reflects only part of the issue.[17] The mere presence of creepshot communities leads to broader societal effects, in that these communities

[11] Samuel Warren and Louis Brandeis, 'The Right to Privacy' (1890) 4 *Harvard Law Review* 193.
[12] Ruth Gavison, 'Privacy and the Limits of Law' (1980) 89 *Yale Law Journal* 421, 423.
[13] Daniel Solove, 'Conceptualising Privacy' (2002) 90(4) *California Law Review* 1087, 1147. See also Daniel Solove, 'Privacy and Power: Computer Databases and Metaphors for Information Privacy' (2001) 53 *Stanford Law Review* 1393, 1422: 'The problem with databases emerges from subjecting personal information to the bureaucratic process with little intelligent control or limitation, resulting in a lack of meaningful participation in decisions about our information'.
[14] Sacha Molitorisz, *Net Privacy* (McGill-Queen's University Press, 2020) 153.
[15] Ibid.
[16] Ibid. See also Marc Tran, 'Combatting Gender Privilege and Recognising a Woman's Right to Privacy in Public Spaces: Arguments to Criminalise Catcalling and Creepshots' (2015) 26(2) *Hastings Women's Law Journal* 186.
[17] The theory of 'control over personal information', as articulated by Alan Westin, builds upon Gavison, claiming that privacy is the claim of individuals to 'determine for themselves when, how, and to what extent information about them is communicated to others': Alan Westin, *Privacy and Freedom* (Atheneum, 1967), 7–39.

and their practices promote and even legitimise behaviour which objectifies women.[18] They pose significant risks to the dignity and respect women are afforded in the community, and signals to women that they should not expect privacy when in public.

The issues stemming from creepshots not only concern the individuals photographed, but also broader societal attitudes towards women in public and online. Conventional privacy theories are often vague or narrow, and thereby provide an incomplete solution for potential legal recourse to the issues related to creepshots. This disconnect between capable legal recourse and conventional privacy theories is what Daniel Solove attempts to resolve. He writes that the 'law has often failed to adapt with the variety of privacy problems we are encountering today',[19] and attributes this failure to the law's adherence towards abstract conceptions of privacy which are either overly reductive or broad.[20] Instead, Solove attempts to understand privacy problems from a 'bottom-up' approach by asking:

i. What practices are being disrupted?
ii. What is the disruption?
iii. Who conducts the disruption?
iv. How does the disruption affect the individual, society, and social structure? [21]

In applying this approach to creepshots, the practice disrupted is the woman's personal autonomy to dress and present herself freely in public without concern of not only being surreptitiously photographed or filmed, but also later of having this content uploaded online. Upon seeing themselves on creepshot forums, individuals would likely feel objectified and violated. As identified above, the knowledge that an inestimable number of people are viewing these images for sexual gratification could lead to significant emotional distress.[22] The practice of creepshots and the existence of 'creeper' communities also has negative impacts upon societal constructs, in that it reinforces and legitimises the objectification and denigration of women, hegemonic masculinity, and patriarchal attitudes.[23] Such predatory behaviour has been correlated with increased occurrences of sexual harassment and violence.[24] Moreover, it can affect societal norms to the extent that women should not expect any privacy unless in the safety

[18] Molitorisz (n 14) 154.
[19] Solove, 'Conceptualising Privacy' (n 13) 1147.
[20] Ibid 1128.
[21] Ibid.
[22] A victim of an upskirt photography, suffering from lingering emotional distress, stated: 'After this, how should I respond when a man looks at me? To this day, I cannot sit with my back exposed because I can still feel being watched': 'Peeping Tom's Voyeurism Scars Victims' Psyches', *Talk of the Nation* (NPR, 29 August 2012); See also Ryan Calo, 'The Boundaries of Privacy Harm' (2011) 86 *Indiana Law Journal* 1131, 1160.
[23] Tran (n 16) 193–5.
[24] Ibid 197.

of their own homes. The presence of such a strong, online community perpetuates oppressive societal trends if women are not able to appear in public without the risk of later appearing online for sexual gratification.[25] As such, the party who conducts the disruption is not confined to the person taking the creepshot, but also extends to the 'creeper' community itself because the existence of these communities legitimises and encourages such behaviour of individual perpetrators.

Helen Nissenbaum's doctrine of contextual integrity is relevant here, where she argues that the governing norms of society should dictate whether a flow of personal information is justified or acceptable.[26] Nissenbaum's approach is grounded in the work of Edmund Burke: 'Burke maintained that custom is the best guide to shaping key institutions of civil society because it constitutes the accumulated wisdom, not only of a community but of communities through the ages'.[27] Similarly to Solove, she seeks to 'fill the gap' left by conventional approaches to privacy.[28] Traditional privacy theories tend to fall short in that the focus is often on the content of the information at hand, such as whether it contains personally identifiable information or whether it was taken in a private domain. However, creepshots pose a unique difficulty to privacy as they deliberately fall outside of these characteristics. What should be of greater consideration, especially to the courts and legal practitioners, are the motivations and practices of the creepshot community.

III Legal Recourse

Due to the lack of uniform recognition of a privacy tort by Australian courts, the most authoritative avenue of recourse to date is through the equitable action for breach of confidence as established by the seminal case of *ABC v Lenah Game Meats Pty Ltd* ('*Lenah*'). As will be seen, this is not an ideal solution. The breach of confidence action rests on a foundation not of protecting privacy, but rather protecting against misuse of information. In the alternative, a possible privacy tort has been developed through the lower courts. However, it has not yet been accepted by the superior courts, and there is continuing debate as to whether it will be endorsed in the future. Furthermore, the creepshot raises privacy concerns in two stages: first, the taking of the creepshot itself; and second, the subsequent dissemination not just to the internet, but specifically to creeper community

[25] Solove, 'Conceptualising Privacy' (n 13). Solove wrote that this type of power has a significant potential to render people vulnerable and helpless, as if they are hunted prey or prisoners under constant guard: at 1150; See also Waling (n 2); Ruth Gavison, 'Feminism and the Public/Private Distinction' (1992) 45(1) *Stanford Law Review* 1, 22; Gill Valentine, 'Women's Fear and the Design of Public Space' (1978) 16(4) *Built Environment* 268, 268.
[26] Helen Nissenbaum, *Privacy in Context: Technology, Policy, and the Integrity of Social Life* (Stanford University Press, 2010).
[27] Ibid 162–4.
[28] Ibid 9–10.

forums. There are also broader community effects to consider such as the infringement of women's autonomy to freely dress and express themselves in public. In order for adequate recourse, there must exist a cause of action which deals with all of these matters comprehensively, rather than in part. On this basis, it is contended that the Australian Law Reform Commission's ('ALRC') proposed statutory cause of action for serious invasions of privacy is most capable of achieving this outcome.

A *Breach of Confidence*

In *Lenah*,[29] Gleeson CJ identified the elements of a claim based on the equitable action for breach of confidence ('BOC'):

> First, the information is confidential, secondly, that it was originally imparted in circumstances importing an obligation of confidence, and thirdly, that there has been, or is threatened, an unauthorised use of the information to the detriment of the party communicating it.[30]

The reach of BOC has expanded considerably in recent years, primarily due to the jurisprudential developments in the United Kingdom.[31] Citing the dicta in *Hellewell v Chief Constable of Derbyshire* ('*Hellewell*'),[32] Gleeson CJ stated that BOC may be the most suitable legal action for protecting privacy interests in Australia.[33] His Honour broadened the formulation of 'circumstances importing an obligation of confidence', so that it is no longer necessary for there to be a relationship of trust and confidence in order to protect confidential information.[34] The definition of what is confidential information was also enlarged to embrace 'private' matters.[35] While the Chief Justice observed there was no 'bright line'

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[29] *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 ('*Lenah*').
[30] Ibid 222. See also *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, 47 (Megarry J).
[31] See, eg, *Douglas v Hello! Ltd* (2001) QB 967; *Campbell v MGN Ltd* [2004] 2 AC 457. Some care needs to be taken in considering recent developments in this area in the United Kingdom, because the *Human Rights Act 1998* (UK) requires courts to take into account the rights enshrined in the *European Convention for the Protection of Human Rights and Fundamental Freedoms* ('*ECHR*'). In particular, articles 8 and 10 of the *ECHR*, which confer rights to privacy and freedom of expression respectively, provide parameters within which courts should decide whether an individual's privacy should be protected: *ECHR*, opened for signature 4 November 1950, 231 UNTS 221 (entered into force 3 June 1952); *A v B* [2003] QB 195, 202 (Lord Woolf CJ).
[32] Laws J stated that the action could protect 'what might reasonably be called a right of privacy': *Hellewell v Chief Constable of Derbyshire* ('*Hellewell*') [1995] 1 WLR 804, 807.
[33] *Lenah* (n 29) 224; Jillian Caldwell, 'Protecting Privacy Post *Lenah*: Should the Courts Establish a New Tort or Develop BOC' (2003) 26(1) *University of New South Wales Law Journal* 90, 115; Australian Law Reform Commission ('ALRC'), 'Serious Invasions of Privacy in the Digital era' (Final Report 123, 2014) 265.
[34] *Lenah* (n 29) 224.
[35] Ibid 226. Information recognised as having the necessary quality of confidence was originally in the nature of business or trade secrets. However, in *Lenah*, Chief Justice Gleeson assumed that 'confidential' and 'private' information were comparable, using the terms interchangeably. See also Caldwell (n 33) 115; Des Butler and Paul Meek, 'Camera Trapping and Invasions of Privacy: An Australian Legal Perspective' (2013) 20(3) *Torts Law Journal* 234, 245.

which could be drawn between what is private and what is not, he provided examples of information that is 'easy to identify as private',[36] and also a 'useful practical test': 'Disclosure or observation of information or conduct which would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private'.[37]

The case of *Doe v ABC & Ors* ('*Doe*'), which will be further discussed below, further expanded upon Gleeson CJ's judgment, drawing from English cases since *Lenah*.[38] Hampel J stated that the 'useful practical test' was intended as an *aid* rather than a universal test.[39] Furthermore, what is 'highly offensive' does not apply just to the nature of information, but also actions surrounding the observation, collection, and disclosure of information.[40] There begins a conflation of the first two elements of the BOC action,[41] in that the nature of information and the circumstances surrounding such information may generate a reasonable expectation of privacy for the person the information relates to, and therefore an obligation of confidence.

Sexually explicit or intimate material will generally hold the necessary quality of confidence.[42] It is unlikely that the nature of creepshots alone, which are at most sexually suggestive, would reach this threshold. Creepshots are also taken in the public domain, and there is generally speaking a lower expectation of privacy when in public.[43] However, the United Kingdom case of *Campbell v MGN* demonstrates that widespread publication of a photograph taken in a public setting which causes great embarrassment may ultimately result in an infringement of personal privacy.[44] The surreptitious manner in which creepshots are collected,[45] the unauthorised disclosure of such information, and the fact that it is

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[36] Per Gleeson CJ, 'certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private': *Lenah* (n 29) 226.
[37] Ibid.
[38] Hampel J primarily drew from the English cases of *Douglas v Hello! Ltd* (2001) QB 967 and *Campbell v MGN Ltd* [2004] 2 AC 457: *Doe v ABC & Ors* [2007] VCC 281 [117] ('*Doe*').
[39] Ibid. See also *Campbell v MGN Ltd* [2004] 2 AC 457 [21]–[22].
[40] *Doe* (n 38).
[41] Butler and Meek (n 35) 247. See also *A v B* [2003] QB 195.
[42] *Doe* (n 38); *Giller v Procopets* [2008] VSCA 236 ('*Giller*'); *Wilson v Ferguson* [2015] WASC 15 ('*Wilson*'); *Lenah* (n 29).
[43] ALRC (n 33) 100.
[44] *Campbell v MGN* [2004] 2 AC 457. Naomi Campbell was in a public place when she was photographed leaving a Narcotics Anonymous meeting. Lord Hoffman held, 'the widespread publication of a photograph of someone which reveals him to be in a situation of humiliation or severe embarrassment, even if taken in a public place, may be an infringement of the privacy of his personal information': at [75].
[45] Ibid. Butler submitted that 'the fact that the information could only be obtained through surreptitious means should normally be an indication that in the circumstances there was a high expectation of privacy': Butler and Meek (n 35) 247.

uploaded in a forum where the information is directed towards sexual gratification, are factors in which a reasonable person with ordinary sensibilities would be highly offended by. This would almost certainly be the case if the individual is clearly identifiable.[46] Only by placing emphasis on the circumstances surrounding the collection and disclosure of the information, rather than its content, is it possible that unauthorised publication of creepshots would be a breach of the subject's expectation of privacy.

In respect to the third element, *Giller v Procopets* ('*Giller*') and *Wilson v Ferguson* ('*Wilson*') notably held that a plaintiff can recover damages for emotional distress under this action.[47] Both of these cases concerned an instance where the defendant and plaintiff recorded sexually explicit material of themselves. Upon deterioration of the relationship, the defendant posted the recorded material online or displayed it to people known to the plaintiff, without the plaintiff's consent. Courts have displayed a willingness to respond and award significant damages where the unauthorised disclosure of private information is motivated by malice.[48] Should this be satisfied, it is contemplatable that an equitable action in BOC is capable of providing recourse for creepshot subjects.

Despite Gleeson CJ's invitation for the development of the equitable action of BOC towards privacy interests, the law has seen a stuttering progression compared to its United Kingdom counterpart.[49] The Australian cases of *Giller* and *Wilson* involved very typical facts amounting to BOC, meaning superior courts have not encountered situations where developments in this area were necessary. While *Doe* has developed the BOC action towards spaces of a 'reasonable expectation of privacy' and a plaintiff's right to control of information, it remains a lower court decision. There have also been indications towards a rejection of BOC as a means of securing future protections of privacy in English common law.[50] Moreover, BOC and tortious actions for misuse of private information rests on different legal foundations:[51] secret or confidential information on the one hand; and privacy on the other.[52] This is particularly important in the Australian context, as it echoes Gummow and Hayne JJ in *Lenah* for their call towards

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[46] An example of when the subject is clearly identifiable is if their face has not been censored.
[47] *Giller* (n 42); *Wilson* (n 42). In *Wilson*, per Mitchell J at [82], this development was made in order to accommodate for the reach of 'electronic communications in contemporary Australian society'.
[48] *Wilson* (n 42).
[49] See, eg, *Stephens v Avery* [1988] Ch 449; *Hellewell* (n 32); *Douglas v Hello! Ltd* (2001) QB 967; *A v B* [2003] QB 195; *Campbell v MGN Ltd* [2004] 2 AC 457.
[50] *Douglas v Hello! Ltd* [2001] 2 WLR 992, 1025 (Sedley LJ). Per Sedley LJ, 'the law should no longer have to construct an artificial relationship of confidentiality between intruder and victim: it can recognise privacy itself as a legal principle drawn from the fundamental value of personal autonomy'.
[51] *Google v Vidal Hall* [2015] EWCA Civ 311.
[52] Ibid.

a development of a privacy tort, rather than in BOC.[53] Indeed, the BOC action is only helpful to the extent that the information is actually published. However, the creepshot problem is larger than simply its online disclosure—what of the activity of taking surreptitious public photos of women itself?

B *Privacy Tort*

The first 'bold step' in recognising an action for unreasonable intrusion, which could potentially yield a remedy for a person unknowingly photographed or recorded by a creepshot perpetrator, was taken by Skoien SJ in the Queensland District Court of *Grosse v Purvis* ('*Grosse*').[54] It was alleged: that the defendant persistently loitered by the plaintiff's residence, work or recreation; instances of unauthorised entry to her house and yard; repetitious phone calling; and offensive and insulting language to her, her friends, and relatives. His Honour characterised this behaviour as tantamount to stalking, and held that such behaviour involved an invasion of the plaintiff's privacy.[55] In referring to Prosser's 'intrusion upon seclusion' tort in the United States,[56] his Honour laid out the relevant elements for a new Australian tort of privacy:

a) A willed act by the defendant;
b) Which intrudes upon the privacy or seclusion of the plaintiff;
c) In a manner which would be considered highly offensive to a reasonable person of ordinary sensibilities;[57] and
d) Which causes the plaintiff detriment in the form of mental physiological or emotional harm or distress or which prevents or hinders the plaintiff from doing an act which she is lawfully entitled to do.[58]

The American tort of 'intrusion upon seclusion' usually encompasses intrusions into a person's physical private space or private affairs, such as peering through a person's bedroom window or stalking her locations, but

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[53] *Lenah* (n 29) 255.
[54] 'It is a bold step to take, as it seems the first step in the country to hold that there can be a civil action for damages based on the actionable right of an individual person to privacy. But I see it as a logical and desirable step. In my view there is such an actionable right.': *Grosse v Purvis* [2003] QDC 151, [442] ('*Grosse*'); See also Butler and Meek (n 35) 241; ALRC (n 33) 301.
[55] *Grosse* (n 54) [420].
[56] William Prosser, 'Privacy' (1960) 48 *California Law Review* 383, 389. A description of Prosser's 'intrusion upon seclusion' tort can be found in American Law Institute, *Restatement (Second) of Torts* §652B: 'One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another person or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person'. Restatements by the American Law Institute are effectively codifications of US common law principles and are regarded as authoritative by American courts.
[57] Butler and Meek suggest that the third element of Skoien SJ reflects Gleeson CJ's test of private matters: Butler and Meek (n 35) 243.
[58] *Grosse* (n 54) [444].

may also extend to surreptitiously taking intimate photographs for one's own purpose.[59] While the contexts of stalking and creepshots are quite different, it is possible that the non-consensual photography or filming of women in public, particularly for one's own sexual pleasure, would not only be an intrusion upon privacy, but one highly offensive towards a reasonable person. However, it is acknowledged that because creepshots are not sexually explicit in nature and are taken in a public domain, it may also be argued that they do not fulfill the second element of the test. This is not to say that any material taken in public precludes subjects to a right to privacy.[60] For example, surreptitious photography of a person engaging in an intimate activity in public, such as urinating or sexual activities, would likely satisfy this test.[61] The content of creepshots, however, are not likely to be characterised as 'intimate', as they are images of women completing ordinary tasks in public. Moreover, the intrusion upon seclusion tort, and thereby Skoien SJ's tort of privacy does not allow for full comprehension of the harm caused by creepshot trends as it focuses more on the taking of creepshots rather than the subsequent online dissemination to 'creeper' communities.[62]

On the other hand, in the case of *Doe*, Hampel J of the Victorian County Court took an 'incremental step' in broadening Australia's nascent privacy tort to protect against the unjustified publication of personal information.[63] This case concerned the media disclosure of an identity of a rape victim, despite there being a statutory prohibition. Although not explicitly stated in the judgment, the elements discerned are:

a) An unjustified act by the defendant;
b) Which results in unauthorised publication of personal or confidential information;
c) Where the plaintiff had a reasonable expectation that the information would remain private;
d) And the publication of the information causes the plaintiff detriment in the form of emotional harm or distress.[64]

The formulation of 'unjustified', as opposed to 'willed', was to provide a 'fair balance between freedom of speech and the protection of privacy'.[65] This step is particularly helpful as it is likely the case that the non-consensual photography or filming of a person and subsequent disclosure online is 'unjustified'.

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[59] Nicole Moreham, 'Beyond Information: The Protection of Physical Privacy in English Law' (2014) 73(2) *Cambridge Law Journal* 350, 351.
[60] See the brief discussion of *Campbell v MGN* [2004] 2 AC 457 in Part IIIA.
[61] Butler and Meek (n 35) 243.
[62] Mark Warby et al, *Tugendhat and Christie: The Law of Privacy and the Media* (Oxford University Press, 2011) [3.68].
[63] *Doe* (n 38) [162].
[64] Ibid [163].
[65] Ibid.

The main issue is whether creepshots are personal or confidential information which a subject had a reasonable expectation would remain private;[66] and whether disclosure was 'plainly something which the [subject] was entitled to decide for herself'.[67] Creepshots are not 'easy to identify as private',[68] and so the practical, though not universal, test given by Gleeson CJ is helpful here.[69] It is arguable that creepshots, and the circumstances surrounding their observation, collection, and disclosure, would give rise to a reasonable expectation of privacy, and that their disclosure was something the subject would want to decide for herself. This would be more likely if she were clearly identifiable in the image. Given this and the lack of public interest in publishing such information,[70] unauthorised disclosure may be unjustified, meaning creepshot perpetrators and moderators will have failed to exercise reasonable care in protecting the subject's privacy. The tort will provide damages where the subject has suffered emotional distress.[71]

It is important to note, however, that Australian superior courts have not confirmed the existence of this tort, and subsequent case law does not provide clarity in whether this tort will be recognised in the foreseeable future.[72] In *Giller*, the Supreme Court of Victoria found it unnecessary to consider whether the tort of invasion of privacy exists at common law, having upheld the plaintiff's claim on the basis of the equitable action for BOC.[73] To date, there has been considerable academic commentary to support the proposition that *Lenah* opened the door for the development of a privacy tort.[74] However, Kelly J in the case of *Sands v State of South Australia* denies this, stating that the High Court in *Lenah* '[did not] hold out any invitation to intermediate courts in Australia to develop the tort of privacy as an actionable wrong'.[75] Privacy protection under tortious law is, at best, uncertain. As demonstrated from the cases above, there is a level of doubt in not only its existence, but also its ability in dealing with creepshots holistically. The current approaches are fragmented, and

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[66] Ibid.
[67] Ibid.
[68] Hampel J avoids providing an 'exhaustive definition of privacy' but considers information regarding rape victims as a category of information which is 'easy to identify as private.' Here, she references the first formulation of 'private' by Gleeson CJ in *Lenah*: *Doe* (n 38) [119], [162].
[69] Ibid.
[70] Ibid. In *Doe*'s circumstances, the 'absence of public interest, the clearly private nature of the information, and the statutory prohibition on publication' all pointed to the publication being unjustified: at [163].
[71] Ibid.
[72] *Giller* (n 42); *Sands v State of South Australia* [2013] SASC 44; ALRC (n 33) 54.
[73] ALRC (n 33) 54; *Giller* (n 42) [168].
[74] Caldwell (n 33); Butler and Meek (n 35); ALRC (n 33); Megan Richardson, 'Whither Breach of Confidence: A Right of Privacy for Australia?' (2002) 26 *Melbourne Law Review* 381; Greg Taylor and David Wright, 'Privacy, Injunctions and Possums: An Analysis of the High Court's Decision' (2002) 26 *Melbourne Law Review* 707.
[75] *Sands v State of South Australia* [2013] SASC 44, [614].

focusses on either the taking of the creepshot, the content of it, or its subsequent online disclosure. This results in an incomplete analysis of whether creepshots are indeed a breach of a privacy tort.

C *Proposed Statutory Cause of Action*

In *Lenah*, Gummow and Hayne JJ stated that 'the disclosure of private facts and unreasonable intrusion upon seclusions perhaps come closest to reflecting a concern for privacy "as a legal principle drawn from the fundamental value of personal autonomy"'.[76] Similarly, Nicole Moreham identified two 'overarching categories' in which an individual's privacy may be breached. The first overarching category involves unwanted watching, listening, recording, and dissemination of material; the second is the obtaining, keeping and dissemination of private information, which 'have at their heart the misuse of private information'.[77] The ALRC, in considering this as well as the stagnant developments in a privacy tort and BOC action, recommended the creation of a statutory cause of action confined to two broad categories of invasion of privacy, being the intrusion upon seclusion, and misuse of private information.[78] While it has not yet been implemented into Australian legislation, it is necessary to analyse its suitability as recourse to the creepshot trend.

The elements of the ALRC's proposed statutory cause of action for serious invasions of privacy are:

1. The invasion of privacy must be either by intrusion into seclusion or by misuse of private information;
2. It must be proved that a person in the position of the plaintiff would have had a reasonable expectation of privacy in all of the circumstances;
3. The invasion must have been committed intentionally or recklessly;
4. The invasion must be serious;
5. The invasion need not cause actual damage, and damages for emotional distress may be awarded; and
6. The court must be satisfied that the public interest in privacy outweighs any countervailing public interests.

The first two elements are to be considered together, and what is considered 'private' will be a question of whether a person in the position of the plaintiff would have had a reasonable expectation of privacy, in all of the circumstances.[79] Importantly, the 'reasonable expectation' test has been formulated with the intention of it being flexible and adaptable to changing

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[76] *Lenah* (n 29) 251 (Gummow and Hayne JJ) quoting Sedley LJ in *Douglas v Hello!* [2001] 2 WLR 992, 1025.
[77] Moreham (n 59) 374.
[78] ALRC (n 33) 23.
[79] Ibid 90.

community expectations of privacy over time. According to the Office of the Information Commissioner in Queensland, this test would 'reflect both community standards and provide sufficient flexibility for the modern range of social discourse'.[80] There appears to be a certain level of adoption from Helen Nissenbaum's doctrine of contextual integrity. The recommended factors to consider in establishing a person's reasonable expectation of privacy include: the nature of the private information; the means used to obtain the private information or intrude upon seclusion; the place where the intrusion occurred; the purpose of the misuse or intrusion; how the private information was held or communicated; whether the private information was already in the public domain; the attributes of the plaintiff; and the conduct of the plaintiff.[81] There may be a desire to draw parallels with Gleeson CJ's 'useful practical test', but the ALRC has explicitly stated that the level of 'offensiveness' of a disclosure or intrusion should be only one factor in determining a reasonable expectation of privacy.[82]

As demonstrated by *Grosse* and *Doe*, it may be argued that creepshots are an invasion of privacy by intrusion into seclusion and misuse of private information. In relation to the second element, establishing a 'reasonable expectation of privacy' would require emphasis towards the motives behind the collection and subsequent disclosure of the creepshot. The hypothetical plaintiff would intuitively object to a photo of herself being uploaded onto an online forum without her consent, regardless of whether she is identifiable. This is even more the case given that the image will be used by countless members for their own sexual indulgence. Moreover, there is no demonstrable public interest for such disclosure, and participation in any activities related to the creepshot community only serves to diminish respect and dignity towards women in society. Unauthorised disclosure to an online creepshot community is likely to satisfy recklessness or intent.[83] The emotional distress, humiliation, and affront to dignity which arises from appearing on creepshots forums would, objectively speaking, be likely to reach the 'threshold' for a serious invasion, and is sufficient for damages to be awarded as demonstrated by previous case law.[84] Disclosure motivated by malice may also be viewed as a serious invasion of privacy.[85] Given that this cause of action does not require actual damage to be shown, creepshot subjects who are not identifiable by the wider public are still able to access this legal avenue.

With the statutory cause of action being underpinned by the two broad categories identified in *Lenah* and by Moreham, it is capable of analysing

[80] Ibid 93.
[81] Ibid 91.
[82] Ibid 95.
[83] Ibid 110.
[84] Ibid 131–2.
[85] Ibid.

the contextual and privacy issues of creepshots in totality. This includes the issues surrounding the photography and filming of creepshots, their online dissemination to specifically 'creeper' forums, and broader community effects such as the diminishment of women's autonomy as well as the legitimisation of objectification of women without their consent.

IV Moving Forward

Combatting the proliferation of creepshots will require stronger privacy law protections in Australia. The legal recourse available under a privacy tort and an equitable action for BOC remains unclear and the recommended statutory cause of action has not yet come into force. It is submitted, however, that the proposed statutory cause of action is most capable in providing remedy for subjects due to its ability to contemplate issues of creepshots in a comprehensive manner. Indeed, it allows for consideration over the surreptitious nature in which the creepshots were taken, the contents of the image or film, the location of where it is later disclosed, the purpose of its collection and disclosure, and also the detrimental effects creepshot practices and online 'creeper' communities have upon broader society's opinion on the standing of women, and a woman's autonomy to dress and conduct herself freely in public.

Recent federal reports such as Australian Competition and Consumer Commission's ('ACCC') Digital Platform Inquiry Report and the Human Rights and Technology Discussion Paper by the Australian Human Rights Commission ('AHRC') may also serve as inspiration in providing a more practical approach in tackling creepshot trends. In addition to supporting the introduction of the ALRC's statutory cause of action for serious invasions of privacy, the ACCC has also recommended that social media and online platforms should be required by law to stop using or disclosing an individual's personal information upon request.[86] Moreover, both the ACCC and the AHRC have proposed that emerging technologies and digital platforms should be assessed against a 'code of practice' or 'ethical framework' to ensure that people's personal information is handled by digital platforms and businesses in an appropriate way.[87] While such recommendations were made in the context of competitive markets or human rights, which fall outside the scope of this paper, it is recognised that similar regulation will need to exist for creepshots as well. Adequate legal recourse is an important avenue for aggrieved individuals, and it is necessary that the ALRC's statutory cause of action is created to allow for this. However, perpetrators on these creepshot forums often operate pseudonymously, making them difficult (although not impossible) to

[86] Australian Competition and Consumer Commission, *Digital Platforms Inquiry – Final Report: Executive Summary* (2019) 23.
[87] Australian Human Rights Commission, *Human Rights and Technology Discussion Paper: Executive Summary* (2019) 7.

identify. More proactive measures are necessary, such as ensuring that online domains, by way of privacy codes or frameworks, are obligated to specific data practices.[88] Most relevant here would be a complaints system in which members of a digital platform, regardless of whether they are a subject of creepshots, are able to report such behaviour to site administrators or relevant federal regulators so that they are able to eliminate this content and revoke membership of those responsible.

V CONCLUSION

Creepshots are a complex issue and require a focus on what norms and social practices are being disrupted by the offending behaviour. This article has attempted to display that contemporary approaches to privacy, such as Daniel Solove's bottom-up approach and Helen Nissenbaum's doctrine of contextual integrity, successfully navigate these complexities to demonstrate that creepshots constitute a breach of privacy. However, the current law in Australia, specifically the nascent Australian privacy tort and the equitable breach of confidence action are not sufficient to fully comprehend these complexities. This article contends for the creation of the ALRC's proposed statutory cause of action for serious invasions of privacy as it is shown to be the most effective avenue of legal recourse for creepshots. Moreover, regulators and the wider online community will also need to play a proactive role in policing digital platforms to ensure that the creepshot trend continues to be suffocated. Not only should identifiable creepshot subjects be afforded swift, immediate recourse, but it is of even more importance to signal to the broader community that practices which encourage and legitimise the denigration and objectification of women, promote patriarchal attitudes, and oppress their autonomy to dress and act freely in public, will not be tolerated.

[88] These may include notification and consent requirements of what data is being collected and disclosed, opt-out control pertaining to personal information, information security, and complaints handling.