

3 June 2016

The Hon Gabrielle Upton MP
Attorney-General
GPO Box 5341
SYDNEY NSW 2001

By email: kevin.wilde@minister.nsw.gov.au

Dear Attorney-General,

The media organisations that are parties to this correspondence – AAP, ABC, APN News & Media, Australian Subscription television and Radio Association, Bauer Media Group, Commercial Radio Australia, Community Broadcasting Association of Australia, Fairfax media, Free TV, MEAA, News Corp Australia, NewsMediaWorks, SBS and The West Australian – write regarding the Legislative Council’s Standing Committee on Law and Justice report into remedies for the serious invasion of privacy in NSW (the Report).

As you know, the Joint Media Organisations made a submission¹ to the inquiry and outlined our reasons for not supporting a statutory cause of action in NSW. We are writing now to articulate our overarching concern that despite findings in the Report there continues to be a lack of evidence to substantiate a need for a statutory cause of action for serious invasion of privacy in New South Wales.

Our views on the appropriate responses to the types of privacy issues considered by the Report are outlined below.

Revenge porn and other technology-facilitated abuse

We note that the press release announcing the Committee’s inquiry gives prominence to the changing technology landscape, and particularly the use of technology to participate in what is commonly known as ‘revenge porn’. The Report focuses on issues associated with revenge porn, and incorporates some specific examples and evidence by submitters and witnesses in this regard.

The evidence given to the Committee suggests, and indeed some evidence itself recommends, that the specific issues identified require review and amendment of a range of existing NSW provisions, including but not limited to the *Crimes Act 1900 (NSW)*. We support this approach, which would provide proportionate and appropriate responses to the evidenced issues. We also support Recommendations 1 and 2 of the Report.

However, there is a lack of systemic evidence to justify the introduction of a statutory cause of action – regardless of whether it would be introduced in concert with changes to existing or new NSW or Commonwealth laws, or on stand-alone basis. On this sound policy-making basis we do not support Recommendations 3 to 7 (inclusive) of the Report.

It is also mentioned in the Report² that benefit would be gained from enhanced access to remedies such as take-down and deliver-up orders. We support further investigation of these approaches.

As the Report mentions, the Commonwealth Government is also active in this area.

¹ <https://www.parliament.nsw.gov.au/committees/DBAssets/InquirySubmission/Summary/36340/0022%20Media%20Organisations.pdf>

² The Report, at [3.42]

At the end of April 2016 the Minister for Women, Senator Michaelia Cash, in concert with the Minister for Communication Senator Mitch Fifield, launched³ new website, www.esafety.gov.au/women that empowers women to take control online and protect themselves from technology-facilitated abuse. According to the Ministers' press release:

The site offers practical advice on how to check security settings across all digital devices, including smartphones and tablets, wearables and internet-connected health devices. The site also provides tips on how to deal with serious online abuse such as cyber stalking, trolling, and sharing intimate images without consent, often referred to as 'revenge porn'.

The Council of Australian Governments met in December 2015. The communiqué from that meeting⁴ says:

Drawing on advice from the COAG Advisory Panel, Leaders took further significant steps to address violence against women and their children by agreeing to:

- *standards to ensure interventions with perpetrators are effective around Australia;*
- *actions to limit technology-facilitated abuse;*
- *introduce a national Domestic Violence Order (DVO) scheme so DVOs issued in one state will be recognised in all others, with every jurisdiction committing to introduce laws to give effect to this in the first half of 2016;*
- *develop a comprehensive national DVO information sharing system that police and courts will be able to use for evidentiary purposes or to enforce DVOs, noting this will take several years to fully implement; and*
- *in the short-term, establish an interim information sharing system that will provide police and courts with information on all DVOs that have been issued, but will not have the same evidentiary or enforcement capacity as the permanent system.*

COAG agreed to a national summit on preventing violence against women and their children in the last quarter of 2016 to profile best practice and review progress.

It has since been reported that Minister Cash said⁵:

This includes reviewing Commonwealth, State and territory legislation to ensure it adequately criminalises the distribution of intimate material...without a victim's consent.

Drones

There is a lack of evidence regarding the matter of drones. The Report itself states that the Committee received no direct evidence from victims of drones or unmanned aerial vehicle surveillance.⁶

The application of sound policy-making principles to this lack of evidence means that if there is not a systemic evidenced problem, then there is not a problem that requires a 'fix'. However, this is the opposite of the view put in the Report – that drones and unmanned aerial vehicle surveillance will become an issue and therefore adds weight to the recommendation for a statutory cause of action.

We do not support this reasoning as it is not bedded in sound policy-making, and therefore cannot be used to justify the recommendation for a statutory cause of action as it is baseless.

³ <https://ministers.dpmc.gov.au/cash/2016/new-esafety-women-website-launched>

⁴ <https://www.coag.gov.au/node/529>

⁵ <http://www.brisbanetimes.com.au/queensland/revenge-porn-laws-needed-sooner-rather-than-later-20160204-gmm432.html>

⁶ at [2.47]

Big data breaches

The Report also cites big data breaches as a factor in support of a statutory cause of action.

It should be noted that the issue of data breaches are being dealt with within the Federal jurisdiction. Prior to the calling of the Federal election, the Attorney-General's Department was consulting on the exposure draft of legislation, *Privacy Amendment (Notification of Serious Data Breaches) Bill 2015*.

Also, the Office of the Australian Information Commissioner publishes guidelines⁷ for data breach notifications for Commonwealth agencies and organisations (as defined by the *Privacy Act 1988 (Cth)*).

We support data breach issues being dealt with in a unified manner within existing Federal Government law.

Summary

In summary, in considering the Report we believe that the NSW Government should not accept the recommendation, and subsequent recommendations, for a statutory cause of action as it is not based on evidenced systemic issues and would therefore be disproportionate.

However, we believe that the Government should investigate the evidenced issues contained in the Report that are able to be addressed proportionally within the existing frameworks, taking account of work being progressed at COAG.

A delegation of media organisation representatives would welcome an opportunity to meet with you to discuss this important issue further.

Kind regards

Georgia-Kate Schubert
on behalf of the Joint Media Organisations



⁷ <https://www.oaic.gov.au/agencies-and-organisations/guides/data-breach-notification-a-guide-to-handling-personal-information-security-breaches>