



Australian Government
Department of Foreign Affairs and Trade

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30 August 2018

Mr Joseph Cannataci
Special Rapporteur on the right to privacy
Office of High Commissioner for Human Rights
United Nations Office at Geneva
Palais des Nations
1211 Geneva 10
Switzerland

Dear Mr Cannataci

Second communication from the Special Rapporteur on the right to privacy concerning the alleged violation of the right to privacy of Ms Bricana Rose and the alleged legislative gap in the protection of privacy in Australia.

I refer to your communication dated 4 July 2018, which refers in turn to your previous correspondence of 14 August 2017 and to the Australian Government's response of 13 October 2017. The Australian Government acknowledges the communication and understands that you are seeking further information on both the introduction into Australian law of a statutory cause of action for serious invasions of privacy and on the case of Ms Bricana Rose with regards to the alleged violation of her right to privacy.¹

As requested, the communication was transmitted to Ms Julie Bishop MP, the former Minister for Foreign Affairs. I am responding on behalf of the new Minister for Foreign Affairs, Senator the Hon Marise Payne.

1. Australia's progress on introducing a tort of privacy

The Australian Government notes that your communication of 4 July 2018 asks for information or comments on Australia's progress in introducing a statutory tort of action of serious invasion of privacy, whether at the federal or state level. At present, there is not a

¹ Australia notes that 'Bricana Rose' is a pseudonym used for the purposes of this complaint.

statutory cause of action for serious invasions of privacy provided for in the *Privacy Act 1988* (Cth) (Privacy Act) or other Australian legislation.

The Australian Government has indicated previously that it does not support the introduction of a statutory cause of action for a serious invasion of privacy. As outlined by the Australian Government in our previous responses to you,² there are a number of other common law causes of action which can provide alternative avenues of redress for interferences with privacy. These include the torts of trespass, negligence, nuisance and defamation, and breach of the equitable obligation of confidence. Additionally, the High Court of Australia has left open the possibility of a tort of privacy developing through the common law.³

Accordingly, at this time the Australian Government does not intend to introduce a statutory cause of action for serious invasions of privacy.

State and territory approaches to a statutory cause of action for invasions of privacy

As you note, some Australian State Government committees and law reform commissions have discussed and recommended the introduction into Australian law of a statutory cause of action for serious invasions of privacy.⁴

The New South Wales (NSW) Government has provided the following information in relation to the introduction of a statutory cause of action for invasions of privacy.

NSW has a comprehensive legal framework for protecting personal information and privacy intrusions. A statutory tort for serious invasion of privacy is a predominantly private action by individuals which could impact on the complementarity between the existing regimes, protections and remedies.

The NSW privacy framework includes:

- *a legislative information access regime enabling individuals to obtain information from government (Government Information (Public Access) Act 2009 (NSW))*
- *legislative protections under a privacy regulatory regime (Privacy and Personal Information Protection Act 1998 (NSW); Health Information Records Act 2002 (NSW))*
- *common law and equity have entrenched a range of legal avenues through which individuals can seek redress for interferences with their privacy (e.g. the tort of trespass to the person; obligation confidence)*

² Australian Government response to the Special Rapporteur on the Right to Privacy, 13 October 2017; Australian Government response to the Special Rapporteur on the Right to Privacy, 22 February 2018.

³ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at [189].

⁴ These include the Australian Law Reform Commission, *For your information: Australian privacy law and practice*, Report 108 (2008); NSW Standing Committee on Law and Justice, *Remedies for the serious invasion of privacy in New South Wales*, Report 59 (2016), the NSW Law Reform Commission, *Invasion of Privacy*, Report 120 (2009); Victorian Law Reform Commission, *Surveillance in Public Places*, Report 18 (2010); South Australian Law Reform Institute, *A statutory tort for invasion of privacy*, Final Report 4, (2016).

- *criminal laws that prosecute privacy invasions involving intimate images as criminal offences (Division 15C of the Crimes Act 1900 (NSW) criminal prohibitions on intimate images).*

2. Ms Bricana Rose

The Australian Government acknowledges your request for information on the measures taken by the Australian Government to protect Ms Bricana Rose's right to privacy and provide her a remedy for the alleged violations of her privacy. The Australian Government notes that you have expressed 'very serious concern' that Ms Rose has not yet been provided with a remedy in regards to these allegations.

International legal framework

Australia reiterates that it takes its obligations under international human rights law very seriously, including its obligations under Article 17 of the International Covenant on Civil and Political Rights (the Covenant). The Australian Government considers that Ms Rose's complaint could be referred, with her consent, to the United Nations Human Rights Committee (the Committee) in line with the communications procedure established under the Optional Protocol to the Covenant. As Australia noted in its response of 13 October 2017, the Australian Government considers that this communications procedure is the primary mechanism for considering individual complaints relating to alleged violations of the rights contained in the Covenant. Under this procedure, the Committee considers the merits of an individual communication only where admissibility requirements have been met. Furthermore, the communications mechanism provides an appropriate time for response, enabling the State Party to give due consideration to the communication.

Commonwealth legal framework

The Australian Government's 13 October 2017 response to you outlined Australia's comprehensive domestic framework for the protection of personal information under both the Privacy Act and relevant state laws.

The Privacy Act is the relevant legislative framework in the Commonwealth and regulates the collection, use and disclosure of personal information by Australian Government agencies, all private sector entities with an annual turnover of more than \$3 million and certain smaller private sector entities such as health service providers.

The Office of the Australian Information Commissioner (OAIC) is empowered to investigate, conciliate and resolve complaints relating to breaches of the Privacy Act. This provides an efficient and accessible method through which Australians can have breaches of their privacy investigated in the context of acts and practices by entities which are subject to the Privacy Act. Under the Privacy Act, the OAIC is not empowered to investigate the acts of employees which fall outside the scope of their employment duties, as for the purpose of the Privacy

Act, those acts are not considered to be acts or practices of the relevant agency or organisation.⁵

As outlined previously, there are options for individuals to seek review of the OAIC's actions or decisions. Decisions of the Commissioner are appealable to the Federal Court of Australia or the Federal Circuit Court of Australia. Individuals can also approach the Commonwealth Ombudsman for review of actions and decisions of government agencies to assess if they are wrong, unjust, unlawful or unfair.

The Australian Government has also previously provided advice about criminal sanctions under Commonwealth legislation that could apply to non-consensual sharing of intimate images, and that consultations were taking place on a civil penalty regime for the non-consensual sharing of intimate images at the Commonwealth level. The Australian Government is pleased to note that on 23 August the Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Bill 2018 passed the Senate, following passage through the House of Representatives on 16 August. The passage of this Bill strengthens the current criminal regime through the introduction of two aggravated criminal offences for image-based abuse and the introduction of a civil penalty regime which prohibits and penalises non-consensual sharing of or threats to share intimate images.

NSW legal framework

The NSW Government has provided the following information in relation to the case of Ms Rose.

The facts of Ms Rose's case suggest that this event falls outside the jurisdiction of the NSW privacy legislation given that the collection and disclosure of personal or health information was done by an individual who was acting outside the course of their employment.

The former NSW Privacy Commissioner received correspondence from Ms Rose in June 2017 in relation to these events and provided advice on the applicability of NSW privacy laws.

The NSW Government has made efforts to address the legislative gap highlighted by Ms Rose's case through the Crimes Amendment (Intimate Images) Act 2017 (NSW) which was passed by the NSW Parliament on 21 June 2017. The Act makes amendments to the Crimes Act 1900 (NSW) to create a new offence for the non-consensual sharing of intimate images.

Sections 91P, 91Q and 91R provide that it is an offence for a person to intentionally record or distribute, or threaten to record or distribute, an intimate image of another person without that person's consent. The maximum penalty imposed is imprisonment for 3 years or 100 penalty units, or both. Section 91S enables a court that finds a

⁵ Privacy Act 1988 (Cth), s 8(1)(a).

person guilty of an offence against section 91P or 91Q to order the person to take reasonable action to remove, delete or destroy the intimate image concerned.

The amendment was part of the Government's response to the report by the Legislative Council Standing Committee on Law and Justice entitled Remedies for the serious invasion of privacy in New South Wales published in March 2016.

Common law framework

As the Australian Government has previously advised, in Australia the common law has been used to address the non-consensual sharing of intimate images, such as in the case of *Wilson v Ferguson*.⁶ In that matter, the West Australian Supreme Court found that the sharing of intimate images on the defendant's Facebook page constituted a breach of the defendant's equitable obligation of confidence to the plaintiff and made an award of equitable compensation to the plaintiff as a result. The Court described the 'essential elements of an action in equity for breach of confidence' as 'that the information was of a confidential nature, that it was communicated or obtained in circumstances importing an obligation of confidence, and that there was an unauthorised use of the information'.⁷

I trust the above information is of assistance and clarifies the queries expressed in your communication.

Yours sincerely



Sally Mansfield
Permanent Representative
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to the United Nations in Geneva

⁶ [2015] WASC 15.

⁷ *Wilson v Ferguson* [2015] WASC 15, [46].

