

Mandate of the Special Rapporteur on the right to privacy

REFERENCE:
OL AUS 2/2019

12 February 2019

Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the right to privacy, pursuant to Human Rights Council resolution 37/2.

In this connection, I would like to respond to the correspondence received from your Excellency's Government on 30 August 2018 in relation to the legislative gap identified in the protection of the right to privacy in Australia¹. I note the information provided as to why the Australian Government has not moved to introduce a statutory cause of action for serious invasion of privacy, and the other contextual information also provided.

With respect, I contest the adequacy of other common law causes of action that are presented as providing alternate avenues of redress for interferences with the right to privacy when both the Australian and various State law reform commissions have found, repeatedly, that these fail to address the infringements of Australian citizens' right to privacy. Further, the New South Wales Parliamentary Committee with membership drawn across political parties, unanimously found that New South Wales needed a statutory cause of action for serious invasion of privacy. Moreover, I am advised the scope of the New South Wales *Crimes Amendment (Intimate Images) Act 2017* does not include the factual circumstances of the violation of Ms. Rose's privacy. In addition, as advised in the response provided, Ms. Rose's case "falls outside the jurisdiction of the NSW privacy legislation". Clearly therefore, New South Wales does not have a "comprehensive legal framework for protecting personal information and privacy intrusions" as claimed.²

I also note that your Government's response of 30 August 2018 confirms the *Federal Privacy Act 1988* does not have the scope to address the facts of Ms. Rose's complaint.

While I approach these gaps in Australia's protection of the right to privacy, from a human rights perspective, I note that the Australian Competition and Consumer Commission "proposes to recommend that the Government adopt the Australian Law Reform Commission's recommendation to introduce a statutory cause of action for

¹ The legislative gap was first addressed by my mandate in the previous communications submitted on 4 July 2018, AL AUS 3/2018, and on 14 August 2017, AL AUS 4/2017, regarding the violation of the right to privacy of Ms. Briana Rose (pseudonym used by the complainant, an Australian citizen).

² Correspondence received from the Australian Government, dated 30 August 2018, File Number: D18/1414372.

serious invasions of privacy to increase the accountability of businesses for their data practices and give consumers greater control over their personal information.”³

Clearly, it is time for the Australian Government to introduce a statutory cause of action for serious invasion of privacy to uphold the human right to privacy and to ensure competition in the best interests of Australian citizens. I look forward to Australia’s positive actions towards addressing the identified gaps in its privacy protection framework and the development of Australia’s standing in this area.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency’s Government will be made public via the communications reporting website within 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, I urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

Please accept, Excellency, the assurances of my highest consideration.

Joseph Cannataci
Special Rapporteur on the right to privacy

³ Australian Competition and Consumer Commission, ‘Digital Platforms Inquiry Preliminary report’ December 2018, Recommendation 10—serious invasions of privacy, p 14.