



Submission: The Right to Privacy in the Digital Age

Deadline 16th April 2018

Introduction

The Fiji Women's Rights Movement (FWRM), established in 1986, is a multi-ethnic and multicultural non-governmental organisation committed to removing all forms of discrimination against women through institutional reform and attitudinal change. Being a feminist organisation, FWRM uses feminist analysis in the work we do in addressing gender inequality.

Background

Recent global developments in information and communication technologies (ICT) has seen the increasing number of online users sharing personal information through instant messaging and text; and the availability of advanced surveillance systems and data collection for governments to utilise. In Fiji, the use of digital communication technology is part of everyday life with efforts aimed to develop new innovative ways for better online experience, better real-time communication and greater access to information¹. However, the discussion on the right to privacy from increased government surveillance and data collection in Fiji remains an unexplored territory. One of the main reasons for this is the extremely limited resources available to government to conduct surveillance and mass data collection independently. Conducting such large scale exercises require assistance from other countries who are equipped with advanced surveillance systems and data collection capabilities².

¹ (Department of Communication , 2018)<http://www.communications.gov.fj/index.php/statistics>
(Investment Fiji , 2018) <http://www.investmentfiji.org.fj/pages.cfm/for-investors/sector-industry-profiles/information-communication-technology-ict.html>

² (Fiji Sun online , 2017) <http://fijisun.com.fj/2017/11/03/australia-to-assist-in-aerial-surveillance/>

In 2015 though, allegations of neighbouring countries ‘spying’ on Fiji surfaced on mainstream media³ sparking national debate on privacy laws between neighbouring countries. Despite this development, the effects of such invasion of privacy on individuals and marginalised groups remains unclear and undocumented.

With these sentiments, the submission will only address the following issues briefly:

1. Recent developments in national and regional legislations, case law and practice on the right to privacy in the digital age for Fiji;
2. Current situation on the right to privacy in the digital age for women and girls in all diversities in Fiji; and approaches taken to protect these individuals; and
3. Recommendations

1) Recent developments in national and regional legislations, case law and practice on the right to privacy in the digital age for Fiji;

1.1. National developments

a) Legislation

The Right of Privacy under Section 24 of the Constitution states that every person has the right to personal privacy including the right to confidentiality of their personal information; communications; and respect for their private and family life. The right to privacy is not an absolute one as it is subject to further legislations⁴.

Recent developments threatening this right is the proposed Online Safety Bill 2018⁵ which aims to safeguard responsible online behaviour, deter harm to individuals by electronic communications and provide means of redress. The Bill also establishes a Commission with broad powers that can request digital information from any person in the investigation and assessment of a complaint. The Commission can also invite experts to assess complaints which exposes private digital information of reluctant individuals. To bring a legal suit challenging the validity of the Bill can prove problematic as the outcome of such cases would set precedence on the standards

³ (Fiji Sun online , 2015) <http://fijisun.com.fj/2015/03/06/spy-alert/>

⁴ Section 24, Constitution of Fiji 2013: <http://www.paclii.org/fj/Fiji-Constitution-English-2013.pdf>

⁵ Online Safety Bill 2018 <http://www.parliament.gov.fj/wp-content/uploads/2018/03/Bill-7-Online-Safety-.pdf>

and limitations to the right to privacy in the digital age.

b) Case law

There are currently no case law developed regarding the right of privacy in the digital age in Fiji. There are jurisprudence developed through common law based on the abrogated 1997 Constitution which had an identical right of privacy provision to the 2013 Constitution. Furthermore, we note that there have been few cases discussing the right to privacy such as Ambaram Narsey Properties Limited v Khan [2000]⁶; and Nadan v The State [2005]⁷.

The case of Attorney General v Yaya [2009] is an appeal from a High Court decision on a constitutional redress application against the Commissioner of Police for broadcasting the image of the Respondent as one of the "10 most wanted persons" in Fiji. When considering and private and public information the Court stated that private information under section 37 of the Constitution is information in respect of which there is a reasonable expectation of privacy. *"The purposive approach to interpreting this right involves an inquiry into whether there has been an intrusion into the private affairs of an individual. There is no exemption for information obtained by public bodies such as the police. Where the police, in the course of investigations, obtain information which the subject reasonably expects will be kept private, there is a duty not to disclose that information to the public unless it is for a purpose which is justifiable in a democratic society."*

⁶ **Court decision:** the protection of the Constitution or the Fundamental Rights and Freedoms Decree 2000 [7/2000] extends to protect privacy and personal communications. "It is obvious from a review of the cases dealing with similar situations and circumstances of acquisition of such a report that the courts are always mindful of individual rights of privacy. A litigant must be free to instruct his solicitor or his expert in order to prepare his case. However there are instances where the courts will permit such privacy to be intruded upon. These principles are reasonable and justifiable in a free and democratic society. The limitations on the right to personal privacy set by the laws of privilege I conclude qualify as reasonable and justifiable in a free and democratic society [section 37(2)]" <http://www.paclii.org/cgi-bin/sinodisp/fj/cases/FJLawRp/2000/5.html?stem=&synonyms=&query=right%20to%20privacy>

⁷ **Court decision:** the Court found that the "right to privacy is so important in an open and democratic society that the morals argument cannot be allowed to trump the Constitutional invalidity. Criminalizing private consensual adult sex acts against the course of nature and sexual intimacy between consenting adult males is not a proportionate or necessary limitation." <http://www.paclii.org/cgi-bin/sinodisp/fj/cases/FJHC/2005/1.html?stem=&synonyms=&query=right%20to%20privacy>

Furthermore, the Court held that *“we find not only that there was a breach of the Respondent's right to personal privacy, but also that the means employed by the police to apprehend him or to persuade him to surrender, were disproportionate to their aim. The fact that the breach caused the Respondent distress and would have caused distress to a reasonable person, is not a requirement under section 37 of the Constitution. We do not dispute the ability of the police to publish information, even about the identity of a suspect, where it is in the public interest to do so. The apprehension of offenders and the prevention of crime are two legitimate public interest aims. However, in each such case, the publication must be shown to be acceptable in a free and democratic society, and to be proportionate to the public interest aim⁸.”*

From this case, it is understood that the apprehension of offenders and the prevention of crime are two legitimate public interest aims. Section 9 of the Bill allows the Commission to investigate broadly which may be seen as a legitimate limitation to the right of privacy. However any breach to the right of privacy must be shown to be acceptable in a free and democratic society and proportionate to public interest. As such any investigation by the Commission must bear the said principles in mind.

1.2. Regional developments

a) New Zealand

In relation to the right to privacy in the digital age, New Zealand has Harmful Digital Communications Act 2015. This legislation is based on ten key communication principles which lays down the guiding foundation for the application of the legislation.

In a High Court matter under the Harmful Digital Communications Act, re trial has been ordered whereby the District Court had found a man not guilty of breaching the Act on the basis that the distress experienced by the victim did not meet the threshold of serious emotional distress required under the Act. The man had posted inappropriate pictures of his former partner on Facebook. Whilst quashing the decision the High Court Justice made the comment that the District Court Judge had failed to consider

⁸ *Attorney General v Yaya* [2009] FJCA 60; ABU0037.2007 (9 April 2009) <http://www.pacii.org/cgi-bin/sinodisp/fj/cases/FJCA/2009/60.html?stem=&synonyms=&query=right%20to%20privacy&nocontxt=1>

the evidence and context in order to correctly establish serious emotional harm. The High Court Justice also added that “the judge had approached the issue by isolating the various descriptions of how the complainant felt, rather than – as required – assessing the evidence in its totality” and that the Judge had no regard to the context. Considering the legislation is fairly new, it is important to follow the outcome of the retrial as it will set precedence for the upcoming cases under the Act.

b) Australia

In relation to the right to privacy in the digital age, Australia has an Enhancing Online Safety Act 2015. It is different from the New Zealand legislation whereby guiding principles are set out. However, we did not come across any cases whereby people were charged under the legislation. As such we would not be in a position to comment on the practice of the same.

c) Pacific Island Countries

Nauru enacted the Cyber Crime Act in 2015 which aimed to specifically protect children against cyber abuse via media and also the Child Protection Act 2016. A few cases whereby people have been charged under the Cyber Crime Act has been published on Pacific Islands Legal Information Institute (PacLii), a finalized case whereby sentence was delivered is Republic of Nauru v KK [2016]. In this case a Juvenile had taken a picture of a young woman and then shared by the use of blue tooth. The Defendant was sentenced to 18 months imprisonment. Other pacific island countries have drafted bills in relation to cyber security.

In 2016, Papua New Guinea had passed the Cybercrime Act this was done taking into consideration the importance of information along with network security and data integrity. However, the enactment of the law has been perceived as being introduced at a time when the government had faced criticism and that it may be used as a censorship mechanism.

Efforts have been made to discuss the Pacific Island countries police and prosecutorial responses to cybercrime with also taking into consideration electronic evidence. A workshop was held in Tonga whereby 13 Pacific Island Countries participated whereby malicious cyber actors and crimes such as online scams, bank related fraud, identity

theft of individuals. Other domestic issues such as blackmail and harassment were also part of the conversation. As of yet, no cases under the legislation has been published on PaCLII.

Vanuatu and Tonga both have drafted a bill to address cyber security however Tonga's Bill cannot be found online. An analysis carried out on Vanuatu's Bill by Council of Europe concluded that there are various errors in the Bill such as not clearly defining annoyance. Professor Eric Colvin from the University of the South Pacific commented that the language concerning pornography was broad and would be subject to misinterpretation.

2) Current situation on the right to privacy in the digital age for women and girls in all diversities in Fiji

Reported cases of revenge pornography is a growing concern in Fiji particularly because women and girls are the victims of such online attacks. The sharing of intimate images and videos have become easier to upload online given the greater access to the internet and the development of more digital communication technologies. This has seen an increase in people sharing intimate content with their partners through instant messaging services and text.

In 2017 over 900 nude images of young Fijian women were shared online to multiple Facebook groups and websites without the consent of the women in the pictures. Additionally, individuals of past relationships and third parties have posted intimate content on multiple fake accounts to degrade and cause serious emotional distress to ex-partners who are mostly women⁹. This sinister act is extremely damaging to victims because it is humiliating, a violation of trust and traumatic due to victim blaming¹⁰.

2.2) Current approaches taken to protect women and girls in all diversities in Fiji

FWRM notes the establishment of the Cyber Crime Unit designed to investigate complaints of online attacks and make appropriate charges. However, the Unit has not

⁹ (Fiji Sun online , 2017) <http://fijisun.com.fj/2017/09/21/uproar-over-nude-images/>

(Fiji Sun online , 2018) <http://fijisun.com.fj/2018/02/08/police-condemn-new-nude-video-posted-online/>

¹⁰ (Fiji Sun online , 2017) <http://fijisun.com.fj/2017/09/23/victim-tells-all-in-nude-images-saga/>

received many reports to date¹¹ despite the rise of revenge pornography and online attacks.

FWRM notes the existence of call centres and NGOs where victims can seek professional counselling and advice in coping with the situation. While this does not deter other women and girls from sharing explicit content on social media or privately to their partners; it remains a beacon of hope for victims who find themselves in these traumatic circumstances¹².

FWRM notes the proposed Online Safety Bill 2018 which aims to promote the responsible use of online platforms to ensure online safety and deter harm to individuals through electronic communications by others. The proposed Bill also establishes an Online Safety Commission that will to receive and investigate complaints; and provide the means of redress for the victims¹³.

3) Recommendation

FWRM strongly recommends the proactive approach of the Cyber Crime Unit in handling revenge pornography and related cases. This requires more government funding in training officers and technical staff; providing the technology capabilities to work efficiently; and awareness programmes to schools and communities¹⁴.

FWRM strongly recommends that the proposed Online Safety Bill 2018 include guiding principles similar to the Harmful Digital Communications Act 2015 of New Zealand¹⁵ that the Bill is derived from. Including a set of guiding principles will help assist the Commission and the Court in handling cases so that victims of online attacks have effective means of redress while safeguarding the right to freedom of expression contained in the Constitution. Furthermore, FWRM recommends that the Bill also

¹¹ (Fiji Sun online , 2018) <http://fijisun.com.fj/2018/02/08/police-condemn-new-nude-video-posted-online/>

¹² (Fiji Times online , 2018) <http://www.fijitimes.com.fj/story.aspx?id=429569>

(Fiji Sun online , 2016) <http://fijisun.com.fj/2016/08/04/4313-calls-received-by-lifeline-fiji-helpline/>

¹³ (Fiji Parliament , 2018) <http://www.parliament.gov.fj/wp-content/uploads/2018/03/Bill-7-Online-Safety-.pdf>

¹⁴ (PARLIAMENT OF THE REPUBLIC OF FIJI , 2015) <http://www.parliament.gov.fj/wp-content/uploads/2017/02/23-5Report-on-the-Fiji-Police-Force-2015-Annual-Report-v2.pdf>

¹⁵ (Parliamentary Counsel Office, 2015)

<http://www.legislation.govt.nz/act/public/2015/0063/latest/whole.html> Section 6

recognise third parties sharing and re-sharing of intimate content; and make detailed provisions to curb other individuals from sharing those intimate content.

FWRM recommends that lawmakers consider adapting laws and best practices from neighbouring countries on the right to privacy in the digital age to local context to address cybersecurity efficiently.

Reference

- 1 Ambaram Narsey Properties Limited v Khan [2000] FJLawRp 5; [2000] 2 FLR 69 (2 November 2000) <http://www.paclii.org/cgi-bin/sinodisp/fj/cases/FJLawRp/2000/5.html?stem=&synonyms=&query=right%20to%20privacy>
- 2 Attorney General v Yaya [2009] FJCA 60; ABU0037.2007 (9 April 2009) <http://www.paclii.org/cgi-bin/sinodisp/fj/cases/FJCA/2009/60.html?stem=&synonyms=&query=right%20to%20privacy&nocontext=1>
- 3 Auckland High Court orders retrial of case under Harmful Digital Communications Act (2017). (2018). Retrieved from New Zealand Family Violence Clearinghouse: <https://nzfvc.org.nz/news/auckland-high-court-orders-retrial-case-under-harmful-digital-communications-act>
- 4 Dan McGarry 2016 Cybercrime Bill 'Unsafe' http://dailypost.vu/news/cybercrime-bill-unsafe/article_20246b0c-7b6f-5bba-b766-41dd3de32b80.html
- 5 Department of Communication. (2018). ITC Development Index - Fiji Statistics. Retrieved from Department of Communication: <http://www.communications.gov.fj/index.php/statistics>
- 6 Fiji Parliament. (2018). Online Safety Bill 2018. Retrieved from <http://www.parliament.gov.fj/wp-content/uploads/2018/03/Bill-7-Online-Safety-.pdf>
- 7 Fiji Sun online. (2015). Spy Alert. Retrieved from Fiji Sun: <http://fijisun.com.fj/2015/03/06/spy-alert/>
- 8 Fiji Sun online. (2017). Australia To Assist In Aerial Surveillance. Retrieved from Fiji Sun: <http://fijisun.com.fj/2017/11/03/australia-to-assist-in-aerial-surveillance/>

- 9 Fiji Sun online . (2016). 4313 Calls Received By Lifeline Fiji Helpline. Retrieved from Fiji Sun: <http://fijisun.com.fj/2016/08/04/4313-calls-received-by-lifeline-fiji-helpline/>
- 10 Fiji Sun online. (2017). Uproar Over Nude Images. Retrieved from Fiji Sun: <http://fijisun.com.fj/2017/09/21/uproar-over-nude-images/>
- 11 Fiji Sun online. (2017). Victim Tells All In Nude Images Saga. Retrieved from Fiji Sun: <http://fijisun.com.fj/2017/09/23/victim-tells-all-in-nude-images-saga/>
- 12 Fiji Sun online. (2018). Police Condemn New Nude Video Posted Online. Retrieved from Fiji Sun: <http://fijisun.com.fj/2018/02/08/police-condemn-new-nude-video-posted-online/>
- 13 Investment Fiji. (2018). Information, Communication and Technology (ICT). Retrieved from Investment Fiji : <http://www.investmentfiji.org.fj/pages.cfm/for-investors/sector-industry-profiles/information-communication-technology-ict.html>
- 14 Kasek Galgal, 2017 Developing PNG's cybercrime policy: Local contexts, global best practice <https://www.lowyinstitute.org/the-interpreter/developing-png-s-cybercrime-policy-local-contexts-global-best-practice>
- 15 Nadan v The State [2005] FJHC 1; Haa0085 & 0086.2005 (26 August 2005) <http://www.paclii.org/cgi-bin/sinodisp/fj/cases/FJHC/2005/1.html?stem=&synonyms=&query=right%20to%20privacy>
- 16 Pacific Islands Law Officers' Network cybercrime Workshop 23 – 25 May 2017, Nuku'alofa, Kingdom of Tonga, 2017, Ministry of Information and Communications <http://www.mic.gov.to/news-today/press-releases/6726-pacific-islands-law-officers-network-cybercrime-workshop-23-25-may-2017-nukualofa-kingdom-of-tonga>
- 17 Pacific Islands Legal Information Institute. (2018). Constitution of Fiji 2013 . Retrieved from PaCLii: <http://www.paclii.org/fj/Fiji-Constitution-English-2013.pdf>
- 18 PARLIAMENT OF THE REPUBLIC OF FIJI . (2015). STANDING COMMITTEE ON FOREIGN AFFAIRS AND DEFENCE: Review Report of the Committee on the Fiji Police Force Annual Report 2015. Retrieved from <http://www.parliament.gov.fj/wp-content/uploads/2017/02/23-5Report-on-the-Fiji-Police-Force-2015-Annual-Report-v2.pdf>
- 19 Parliamentary Counsel Office. (2015). Harmful Digital Communications Act 2015. Retrieved from New Zealand Legislation : <http://www.legislation.govt.nz/act/public/2015/0063/latest/whole.html>

- 20 Republic of Nauru v KK [2016] NRDC 34; Criminal Case 20 of 2016 (11 July 2016)
- 21 South Pacific Community - Regional Rights Resource Team. (2016). Human Rights in the Pacific a situational analysis. Retrieved from Regional Rights Resources Team:
http://rrrt.spc.int/images/PDF_Files/Human_Rights_In_The_Pacific_A_Situational_Analysis.pdf
- 22 The Universal Declaration of Human Rights. (2018). Retrieved from Claiming Human Rights: http://www.claiminghumanrights.org/udhr_article_12.html#at13
- 23 UNOHCHR. (2018). Convention on the Rights of the Child. Retrieved from United Nations Office of the High Commissioner on Human Rights: <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>