



FROM THE PERMANENT REPRESENTATIVE

AUSTRALIAN PERMANENT MISSION
TO THE UN GENEVA

Ms Beatriz Balbin
Chief
Special Procedures Branch
Office of the High Commissioner for Human Rights
United Nations Office at Geneva
Palais des Nations
1211 Geneva 10
Switzerland

Dear Madam

Communication from the Special Rapporteur on the right to privacy concerning the alleged violation of the right to privacy of ‘Ms Briana Rose’ and the alleged legislative gap in the protection of privacy in Australia.

I refer to the communication concerning an individual complaint by ‘Ms Briana Rose’ in relation to an alleged breach of privacy and the alleged legislative gap in the protection of privacy in Australia, which accompanied your letter dated 14 August 2017.¹

As requested, the communication has been transmitted to the Prime Minister, the Hon Malcolm Turnbull MP. I am responding on the Prime Minister’s behalf.

Australia takes its obligations under international human rights law seriously, and is a longstanding party to the International Covenant on Civil and Political Rights (the Covenant). Australia is committed to upholding its obligations under the Covenant, including the obligation in Article 17 to protect individuals against arbitrary or unlawful interference with their privacy.

The United Nations Human Rights Committee (the Committee) has stated that the right in Article 17 ‘is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons’.² Further, this obligation requires States Parties to ‘adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as the protection of this right’.³ While the views of treaty bodies such as the Committee are not binding on States, Australia considers them in good faith in interpreting its obligations under the relevant treaties. In the Australian Government’s view, Article 17 places an obligation on Australia to take positive measures to ensure individuals are protected from arbitrary and unlawful interferences with their privacy.

¹ Australia notes that ‘Briana Rose’ is a pseudonym used for the purposes of this complaint.

² UN Human Rights Committee, *General Comment No. 16: Article 17 (The right to respect of privacy, family, home and correspondence, and protection of honour and reputation)*, 8 April 1988, UN Doc HRI/GEN/1/Rev.9, paragraph 1.

³ *Ibid.*

With respect to the alleged breach of privacy of 'Ms Briana Rose', the Australian Government notes that the allegations made appear serious. If the complainant is the alleged victim or the alleged victim has consented to this complaint being brought, the Special Rapporteur may wish to refer it to the Committee so that it may be dealt with in the appropriate manner, as a communication involving Australia pursuant to the Optional Protocol to the Covenant. Consistent with its long standing practice, the Australian Government promptly and constructively engages with the communications process.

The Australian Government considers that the communications procedure established under the Optional Protocol to the Covenant 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 (including that the person is a victim, that the person has consented to the communication being made, that all available domestic remedies have been exhausted, and that the claim is sufficiently substantiated). Furthermore, the communications mechanism provides an appropriate time for response, enabling the State Party to give due consideration to the communication.

Operational subparagraph 4(b) of the mandate of the Special Rapporteur on the right to privacy also provides that the Special Rapporteur is to avoid duplication in seeking, receiving and responding to information. Since the Committee is competent to receive communications from individuals alleging breaches of States' obligations under the Covenant, including Article 17, it would be duplicative for the Special Rapporteur to progress the complaint concerning 'Ms Briana Rose' beyond this point.

The Australian Government does not interpret the current mandate of the Special Rapporteur on the right to privacy as empowering the receipt of communications from individuals. Where the United Nations Human Rights Council (the Council) intends a Special Procedures mandate holder to perform these functions, it expressly provides for the receipt of communications on alleged violations of the rights of individuals in the text of the mandate.⁴

We note Article 7 of the Code of Conduct for Special Procedures Mandate-Holders of the Human Rights Council states that:

It is incumbent on the mandate-holders to exercise their functions in strict observance of their mandate and in particular to ensure that their recommendations do not exceed their mandate or the mandate of the Council itself.

The Australian Government appreciates the important contribution made by holders of Special Procedures mandates to the work of the Council. In order to maximise the value of this work, the Australian Government considers it important that the scope of these mandates is carefully adhered to.

The Australian Government is also mindful of its obligations to respect the privacy of 'Ms Briana Rose' in accordance with Article 17 of the Covenant and Australian domestic law in responding to this communication. It notes that where Special Procedures mandate holders do not have a specific mandate to consider individual complaints, Australian authorities are not able to release personal information to them. To do so would likely be a breach of Australia's domestic laws because such persons are not entitled to request and receive personal information under Australian law.

⁴ Human Rights Council, *Special Rapporteur on the rights of persons with disabilities*, HRC Res 26/20, UN GAOR, committee no, 26th sess, Agenda Item 3, UN Doc A/HRC/RES/26/20 (14 July 2014), paragraph 2(b).

Finally, the Australian Government notes the Special Rapporteur's concerns regarding an alleged legislative gap in the protection of privacy in Australia with regards to serious invasions of privacy. The Australian Government provides the following information in response to the concerns raised by the Special Rapporteur.

Privacy framework in Australia

Australia has a comprehensive framework in place for the protection of individuals' personal information.

Federal privacy legislation

At the federal level, the *Privacy Act 1988* (Cth) (the Privacy Act) regulates the handling of personal information by most Australian Government agencies, all private sector and not-for-profit organisations with an annual turnover of more than \$3 million. It also applies to all private health service providers and some small businesses.

The Privacy Act includes the Australian Privacy Principles which, amongst other things, set out obligations in relation to the collection, use, disclosure, quality and security of personal information and access and correction rights of individuals in relation to their personal information.

The Office of the Australian Information Commissioner (OAIC), established by the *Australian Information Commissioner Act 2010*, is responsible for investigating breaches and possible breaches of the Australian Privacy Principles. The OAIC is headed by the Australian Information Commissioner, an independent statutory office holder. The current Australian Information Commissioner, Mr Timothy Pilgrim PSM, is also the Australian Privacy Commissioner, a role similarly established under the *Australian Information Commissioner Act 2010*.⁵

Amendments to the Privacy Act in 2014 enhanced the powers of the Commissioner to resolve privacy complaints, including the ability to seek civil penalties of up to \$1.8 million for serious and repeated breaches of privacy. This system provides an efficient and effective mechanism for ordinary Australians to have breaches of their privacy investigated. In 2016-2017, the OAIC handled 16,793 privacy enquiries and received 2,494 privacy complaints, a 17% increase in privacy complaints from 2015-2016. Also in 2016-2017, the OAIC finalised 95% of privacy complaints within 12 months of receipt.

There are various reasons why the OAIC may decline to investigate privacy complaints, many of which are outlined on the OAIC's website.⁶ Of particular relevance, the OAIC is not empowered to investigate the acts of employees that fall outside their employment duties.⁷

If an individual believes a decision by the Commissioner or his delegate is not legally correct, an application can be made to the Federal Court of Australia or the Federal Circuit Court to have the decision reviewed. Alternatively, if an individual believes they have been unfairly treated by the OAIC, they can complain to the Commonwealth Ombudsman. These rights are clearly articulated on the OAIC's website.⁸

⁵ Mr Pilgrim is referred to as the 'Commissioner' in this letter.

⁶ Office of the Australian Information Commissioner, viewed 12 September 2017, <https://www.oaic.gov.au>.

⁷ *Privacy Act 1988* (Cth), s 8(a).

⁸ Office of the Australian Information Commissioner, viewed 4 September 2017, <https://www.oaic.gov.au/individuals/what-are-my-complaint-review-rights>.

New South Wales (NSW) privacy legislation

We understand that the NSW Government has privacy laws that apply to NSW public sector agencies including government departments, local councils, universities, public sector health organisations, as well as private sector organisations, health service providers, private sector organisations, and businesses with an annual turnover of more than \$3 million which hold health information.⁹ The Information and Privacy Commission NSW (the NSW Commission) administers these laws and has the power to accept and conciliate broad-based privacy complaints.¹⁰ The rights for review of a decision made by the NSW Commission are clearly articulated on its website.¹¹

Common law and equity

The Australian Government notes the Special Rapporteur's view that Australian law does not provide adequate avenues for individuals to seek redress for interferences with their privacy.

Australian common law and law of equity provide a range of avenues for individuals to seek redress for interferences with their privacy. This includes well-established common law torts such as trespass, negligence, nuisance and defamation. The equitable obligation of confidence also protects individuals from the unauthorised use of their information if it has the necessary quality of confidence and is imparted in circumstances importing an obligation of confidence.¹²

In particular, common law and equity have been used to address the non-consensual sharing of intimate images – see, for example, the case of *Wilson v Ferguson* [2015] WASC 15 where the court found that the respondent breached an equitable obligation of confidence by posting explicit images of the plaintiff on the internet, and awarded the plaintiff compensation of nearly \$50,000.

Beyond these protections, the High Court of Australia has held that a tort for the invasion of privacy could develop under the common law of Australia.¹³

Criminal offences

The Australian Government notes the Special Rapporteur's concerns regarding an alleged legislative gap when an individual's intimate images are shared with third parties without their consent. The non-consensual sharing of intimate images is captured by Commonwealth, State and Territory criminal offences.¹⁴ Where this conduct occurs using a mobile phone or the internet, the Commonwealth offence for using a carriage service to menace, harass or cause offence applies (section 474.17 of the *Criminal Code Act 1995* (Cth) (Commonwealth Criminal Code)). This offence has been successfully used on numerous occasions to prosecute such conduct.¹⁵

Due to constitutional limitations, the Commonwealth Criminal Code only focuses on behaviour undertaken using a telecommunication service and so includes online activities, sending an SMS

⁹ *Privacy and Personal Information Act 1998* (NSW); *Health Records and Information Privacy Act 2002* (NSW); Information and Privacy Commission NSW, viewed 13 September 2017, <http://www.ipc.nsw.gov.au/privacy-laws>.

¹⁰ Information and Privacy Commission NSW, viewed 6 September 2017, <http://www.ipc.nsw.gov.au/how-do-i-make-complaint>.

¹¹ *Ibid.*

¹² *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434; *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services and Health* (1990) 22 FCR 73.

¹³ *Australian Broadcasting Australia Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at [189].

¹⁴ *Criminal Code Act 1995* (Cth), s 474.17; *Crimes Act 1900* (NSW), s 91P-Q; *Crimes Act 1900* (ACT), s 61B; *Criminal Code 1899* (QLD), s 227A-B; *Summary Offences Act 1953* (SA), s 26C; *Summary Offences Act 1966* (VIC), s 41A-B; *Police Offences 1935* (TAS), s 13A-B; *Criminal Code Act 1924* (TAS), s192.

¹⁵ *Rodriguez v Direction of Public Prosecutions* [2013] VSCA 216; *Gifford v The Queen* [2016] NSWCCA 302; *Pellegrino v Harman* [2016] ACTSC 366; *Attorney-General (QLD) v Edwards* [2009] QSC 311.

message and making a telephone call (referred to as ‘online’ behaviour). States and territories take responsibility for legislating ‘offline’ offending behaviour. The non-consensual sharing of intimate images can be prosecuted under broad state offences for stalking, identity theft, distributing prohibited content, and offensive conduct.

Many jurisdictions have also introduced specific criminal offences to address the non-consensual sharing of intimate images for both ‘online’ and ‘offline’ offending, guided by national principles relating to the criminalisation of the non-consensual sharing of intimate images (endorsed by the Law, Crime and Community Safety Council). These principles provide a framework for national consistency across jurisdictions addressing the criminalisation of the non-consensual sharing of intimate images. South Australia, Victoria, NSW and the Australian Capital Territory have legislated to specifically criminalise this behaviour, while the Northern Territory has announced that it intends to introduce similar legislation. Western Australia has passed legislation to empower courts to restrain individuals from distributing intimate images in a family violence context. Queensland and Tasmania have legislated to specifically criminalise observations or recordings in breach of privacy and distributing prohibited visual recordings.

In particular, the Australian Government understands that the State of NSW has now introduced criminal laws to address the non-consensual recording and distributing of intimate images.¹⁶ The *Crimes Amendment (Intimate Images) Bill 2017* was introduced to the Parliament of NSW in early 2017 and commenced on 25 August 2017. The legislation introduces specific criminal penalties to the *Crimes Act 1900* (NSW) to target the non-consensual recording and distributing of intimate images. In particular, these offences address the recording, distributing and threatening to record or distribute intimate images without consent. I trust this information will assuage the Special Rapporteur’s concern in relation to cases similar to that of ‘Ms Briana Rose’.

Civil responses

In a civil law context, the Australian Government Department of Communications and the Arts is currently consulting on a proposed civil penalty regime for the non-consensual sharing of intimate images. The civil penalty regime would establish a new prohibition at the Commonwealth level for the non-consensual sharing of intimate images, and will be designed to deter and penalise persons and content hosts who share intimate images or videos of a person without their consent.

The Special Rapporteur has raised concerns about the lack of a statutory cause of action for serious invasions of privacy and has referred to various reports by Australian law reform commissions. In 2015, the New South Wales Legislative Council Standing Committee on Law and Justice (the Standing Committee) published a report into the need for remedies for the serious invasion of privacy in the State. The Standing Committee recommended that the NSW Government introduce a statutory cause of action for serious invasions of privacy. In its response to the Standing Committee’s report, the NSW Government rejected this recommendation, stating that ‘the most effective way to address this harm is by reviewing and amending the criminal law to deter the offensive behaviour, rather than introducing a new statutory cause of action’.¹⁷ The NSW Government has since introduced a specific criminal law to address the non-consensual sharing of intimate images, as discussed above.

The Australian Government does not support the introduction of a statutory cause of action for serious invasions of privacy. Such a cause of action would represent a fundamental shift in the way

¹⁶ *Crimes Act 1900* (NSW) s 91P-R.

¹⁷ New South Wales Government, *New South Wales Government Response to the Legislative Standing Committee on Law and Justice’s report into Remedies for the serious invasion of privacy in New South Wales* (2016) 1.

privacy is currently protected under the Privacy Act and would only be of benefit to those who can afford to bring litigation.

I trust the above information will be of assistance to the Special Rapporteur in clarifying the concerns conveyed in the communication. I look forward to the Special Rapporteur's continued engagement with the Australian Government's efforts to protect the privacy of individuals in Australia.

Yours sincerely



Naomi Dumbrell
Chargé d'Affaires

13 OCTOBER 2017