



FROM THE PERMANENT REPRESENTATIVE

AUSTRALIAN PERMANENT MISSION

GENEVA

4 April 2019

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

Dear Madam

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

I refer to the communication from the Special Rapporteur on the right to privacy, dated 12 February 2019, which accompanies your letter of the same date. The Special Rapporteur's letter addresses matters raised in the Australian Government's response of 30 August 2018. The Australian Government notes the Special Rapporteur's concerns expressed in his letter and provides the following information in response.

The Special Rapporteur urges 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'. The Australian Government has previously indicated that it does not support changes of this nature at this time, noting a range of existing statutory and common law mechanisms that may apply.

Recent law reform

The *Enhancing Online Safety (Non-consensual Sharing of Intimate Images) Act 2018* (the Act) came into effect on 31 August 2018. As indicated in the Australian Government's response of 30 August 2018, the Act strengthens Australia's 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.

Civil penalty regime

The Act establishes a complaints and objection system administered by the eSafety Commissioner. Victims or a person authorised on behalf of a victim are able to lodge a complaint directly to the Commissioner where there is reason to believe that an intimate image has been posted, or threatened to be posted, without consent. Additionally, the

Commissioner may issue removal notices to perpetrators, social media service providers and website and content hosts. Removal notices require the intimate image be removed within 48 hours after the notice has been given, or a longer period as the Commissioner allows. Failure to comply with a removal notice or other remedial action issued by the Commissioner can result in a penalty of up to 500 penalty units (\$105,000) for an individual and up to 2500 penalty units (\$525,000) for corporations.

The Australian Government was aware of Ms Rose's situation when drafting the Act and her experience informed the definition of 'intimate image' in section 9B of the Act. Specifically, subsection 9B(2) defines an intimate image by reference to the image being of a person's genital or anal area in circumstances in which an ordinary reasonable person would reasonably expect to be afforded privacy.

Although the intimate images of Ms Rose were taken before the commencement of the Act, the transitional provision in subsection 19B(6) ensures that the civil penalty regime can apply to any subsequent sharing of those intimate images following the commencement of the Act.

Criminal offences

The Act also includes criminal offences specifically targeted at the offensive distribution of private sexual material to better protect the community from online and technology-enabled abuse and offensive conduct. The new offences complement the existing Commonwealth offence of 'using a carriage service to menace, harass or cause offence' (section 474.17 of the *Criminal Code Act 1995*) and expand upon the civil prohibition and civil penalty regime established by the Act.

The new criminal offences—sections 474.17A and 474.17B—apply to the most serious instances of non-consensual sharing of intimate images. Under subsection 474.17A(1), it is an aggravated offence for a person to use a carriage service to menace, harass or offend, where the commission of that offence involves the transmission, making available, publishing, distribution, advertising or promotion of 'private sexual material' in a way that reasonable persons would regard as being, in all the circumstances, offensive. Recognising the seriousness of such offending, contravention of new section 474.17A(1) carries a maximum penalty of 5 years' imprisonment.

Under subsection 474.17A(2), it is an aggravated offence for a person to use a carriage service to distribute private sexual material in a way that reasonable persons would regard as being, in all the circumstances, offensive, where three civil penalty orders have already been made against the person under the civil penalty regime provided in the Act. Recognising the repeated and serious nature of such offending, contravention of subsection 474.17A(2) carries a maximum penalty of 7 years' imprisonment.

The term 'private sexual material' captures material that appears to depict a person over the age of 18 who is engaged in, or appears to be engaged in, a sexual pose or sexual activity, and material the dominant characteristic of which is a depiction of a sexual organ or the anal region or a person, or the breasts of a female person. The material must depict a person in

circumstances that reasonable persons would regard as giving rise to an expectation of privacy. The definition of private sexual material is neutral and intended to apply to a broad range of material; but also exclude any overlap with offences for child sexual abuse material, which carry more serious penalties.

Recognising that material captured by the definition of ‘private sexual material’ may be transmitted for legitimate purposes, such as medical, artistic or educational purposes, not all instances of the distribution of private sexual material will be captured by the offences. The offence will also not capture private communications between consenting adults or interfere with private sexual relationships.

The Australian Government understands that Ms Rose observed the debate and passage of the Act in the Australian Parliament, and is supportive of the outcome.

The New South Wales (NSW) Government has provided the following information in relation to the Special Rapporteur’s comments about the legal framework in NSW:

As previously outlined, the *Crimes Amendment (Intimate Images) Act 2017* (NSW) introduced offences that criminalise the non-consensual sharing of intimate images in prescribed circumstances. The definition of an intimate image includes an ‘image of a person’s private parts... in circumstances in which a reasonable person would reasonably expect to be afforded privacy’. Although it is not appropriate to comment on the potential applicability of specific offences in the context of this correspondence, it should be noted that it is not accurate to suggest that the offences could not apply to the factual circumstances like those of Ms Rose’s case.

The Australian Government considers that matters concerning the alleged violation of Ms Rose’s right to privacy and the alleged legislative gap in the protection of privacy in Australia have been canvassed thoroughly.

I trust the above information is of assistance to the Special Rapporteur.

Yours sincerely



Sally Mansfield
Ambassador and Permanent Representative
Australian Permanent Mission to the United Nations
Australian Delegation to the Conference on Disarmament