

## Mandate of the Special Rapporteur on the right to privacy

REFERENCE:  
AL AUS 4/2017

14 August 2017

Hon. Prime Minister,

I have the honour to address you in my capacity as Special Rapporteur on the right to privacy, pursuant to Human Rights Council resolution 28/16.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received concerning **the alleged violation of the right to privacy of Ms. Briana Rose<sup>1</sup> and the legislative gap in the protection of privacy in Australia.**

According to the information received:

### *Violation of Ms. Briana Rose's right to privacy*

On 19 December 2014, while Ms. Rose was unconscious under general anesthesia, undergoing gynecological surgery at a private hospital in New South Wales, a nurse present at the operating theatre took several photographs of her genitals using a private mobile telephone, without Ms. Rose's permission. Ms. Rose was lying with her legs in stirrups when the photographs were taken, in order to facilitate the intervention. When she recovered consciousness in the recovery room, Ms. Rose witnessed that the nurse was showing the photographs to a colleague, who visibly reacted negatively to the content being showed on the phone. Ms. Rose did not know at the time what was being shown on the phone.

Five weeks later, Ms. Rose's surgeon informed her about the incident and told her that the nurse's actions were in breach of the hospital's confidentiality policies. The incident had been reported to the hospital's management by the nurse's colleagues. However, the hospital accepted the nurse's word that she had deleted the photographs and did not compel her to produce the telephone that had been used to take them.

The New South Wales Police Force started an investigation, which did not lead to prosecution due to the lack of an applicable offense (sexual "arousal" or "gratification" would be required for the crime of "voyeurism" as defined in Sect 91J of the 1900 New South Wales Crimes Act). The case has been suspended.

The hospital notified the Australian Health Practitioner Regulation Agency (AHPRA) and Ms. Rose made a complaint to the Nursing and Midwifery Council of New South Wales. The Nursing and Midwifery Council of New South Wales

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<sup>1</sup> The name of the victim has been changed at her request.

reprimanded her, but did not take further action. The nurse continues her professional practice.

Ms. Rose, a high school teacher and main source of income for her family, went on medical leave due to the stress caused by the incident and has been receiving psychological therapy at her own expense.

On 3 March 2016, the Standing Committee on Law and Justice of the New South Wales Parliament issued its report on “Remedies for the serious invasion of privacy in New South Wales”, which includes Ms. Rose’s case. The Committee informed that the New South Wales Privacy Commissioner had concluded in November 2015 in relation to Ms. Rose’s case that “remedies available under NSW privacy legislation are inadequate for these circumstances”. The report also recommended the introductions of a civil action to provide remedies to victims of serious privacy violations.

The Federal Privacy Commissioner and the Acting New South Wales Privacy Commissioner advised Ms. Rose on 10 July 2017 (Ref CPC 17 / 01252 –AC) and on 27 June 2017 (Ref: IPC/C000109), respectively, that the national and State based privacy legislation cannot provide redress for her situation.

As of 8 August 2017, a petition launched by Ms. Rose on the platform change.org had received 20,288 signatures ([www.change.org/BrieanaRose](http://www.change.org/BrieanaRose)).

*Background: legislative gap in the protection of privacy in Australia*

Australia does not have a constitutional right to privacy, or secondly, a statutory Bill of Rights that enshrines the right to privacy, or thirdly, a common law tradition that recognizes the right to privacy.

Since 2008, several state and Australian law reform commissions have recommended to enact a statutory cause of action for serious invasions of privacy: Australian Law Reform Commission, Report 108, ‘*For Your Information: Australian Privacy Law and Practice*’, August 2008; NSW Law Reform Commission, Report 120, ‘*Invasion of Privacy*’, April 2009; Australian Law Reform Commission, Report 123, ‘*Serious Invasions of Privacy in the Digital Era*’, June 2014; South Australian Law Reform Institute, Issues Paper 4, 2013 and ‘*Invasion of Personal Privacy*’, 2016.

In 2016, the South Australian Law Reform Institute also recommended the introduction of such a statutory cause of action in its report ‘*A statutory tort for invasion of privacy*’ ([https://law.adelaide.edu.au/research/law-reform-institute/documents/privacy\\_final\\_report\\_4.pdf](https://law.adelaide.edu.au/research/law-reform-institute/documents/privacy_final_report_4.pdf)).

In late 2016, the Australian and State/Territory Attorneys-General discussed a nationally uniform approach to a statutory cause of action for serious invasions of

privacy, regarding which the then New South Wales Attorney General undertook to lead a Working Group. I understand, however, that at the Working Group's meeting the Government of Australia noted that it did not support the creation of a statutory tort for serious invasion of privacy. The Government has not released publicly available reports of the progress of this Working Group or terms of reference providing direction, timeframes or parameters for the Working Group.

In May 2017, the Attorney General of New South Wales announced a proposed Crimes Amendment (Intimate Images) Bill 2017, in order to criminalize the non-consensual sharing of intimate images irrespective of the motivation of the offending party.

While I do not wish to prejudge the accuracy of these allegations, I would like to express **my serious concern that Ms. Briana Rose appears to have been victim of a serious breach of her international human right to privacy, and has not been provided any remedy or reparation** for such a violation despite her having exhausted all available domestic remedies. I am also concerned that a **legislative gap adversely affects the protection of the right to privacy** when someone's personal intimate images are shared with third parties without his/her consent. The acts and omissions as alleged appear to be in breach of Article 12 of the Universal declaration of Human Rights, and Article 17 of the International Covenant on Civil and Political Rights (ICCPR), ratified by Australia on 13 August 1980. These articles establish the international protection of everyone's privacy against arbitrary or unlawful interference, including family, home or correspondence as well as against unlawful attacks on his or her honour and reputation.

In connection with the above allegations and concerns, I am referring Your Excellency's Government to the **Annex on Reference to international human rights law** attached to this letter, which cites international human rights instruments and standards relevant to these allegations.

As it is my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention, I would be grateful for your observations and clarifications:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.
2. Please provide information on the measures taken by your Excellency's Government to protect Ms. Rose's right to privacy and to provide her a remedy for the alleged violations.
3. Please provide information on the measures taken by your Excellency's Government to address the absence of an established general privacy cause of action in accordance with Australia's international human rights obligations under the International Covenant on Civil and Political Rights; and to ensure that the protection of the right to privacy allows victims of

serious invasions of their privacy in Australia to seek remedies, as recommended by the various Law Reform Commissions and other Australian bodies and citizens.

I would appreciate receiving a response within 60 days. Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration. Furthermore, I may address the case and my concern for the inadequate protection of the right to privacy in Australian legislation in my Annual Report to the Human Rights Council.

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

Joseph Cannataci  
Special Rapporteur on the right to privacy

## **Annex**

### **Reference to international human rights law**

In connection with above alleged facts and concerns, I would like to refer to the International Covenant on Civil and Political Rights (ICCPR), ratified by Australia on 13 August 1980, and in particular article 17, which provides for the right of every person to be protected against arbitrary or unlawful interference with his or her privacy, family, home or correspondence as well as against unlawful attacks on his or her honour and reputation. According to the Human Rights Committee (General Comment No 16), article 17 requires the State to adopt legislative measures to give effect to the prohibition against such interferences and attacks, as well as to the protection of this right.

I would also like to refer to Human Rights Council resolution 34/7, which called upon all States to develop preventive measures and remedies for violations and abuses regarding the right to privacy that may affect all individuals, including where there are particular effects for women, as well as persons in vulnerable situations.

Finally, I would like to remind the Government of your Excellency that all rights contained in the ICCPR, as interpreted by the Human Rights Committee in General Comment No. 31 (2004), imply not only the direct respect by all the authorities of the State, but also the protection against the acts of individuals or private entities that impede their enjoyment.