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Mandate of the Special Rapporteur on the right to privacy

24 January 2018

Dear Sir,

I have the honour to address you in my capacity as the Special Rapporteur on the right to privacy, pursuant to resolution 28/16 of the Human Rights Council. I welcome the Government's public call for submissions for the inquiry by the Parliamentary Joint Committee on Intelligence and Security on the Review of the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, which was drawn to my attention today.

I would like to respectfully note that the timing and very brief consultation period for such an important Bill, and over the Christmas period, has not allowed due comprehensive engagement with the Australian community or relevant bodies. For my mandate, the opportunity to draw up a detailed point-by-point analysis has been constrained by the passing of the deadline of 22 January 2018 for submissions. Yet even this brief assessment reveals that there is much within the Bill which requires close attention and review.

The Inquiry has received 16 submissions, of which six are from private citizens, and of these 16 submissions, two, one from the Federal Department of Attorney General and another from a private citizen, support the Bill in its current form.¹ The submissions from the Commonwealth Ombudsman and the Inspector-General of Intelligence and Security point at adverse unintended consequences of the Bill's provisions for their operations, suggesting that the Bill requires significant amendment before it is considered by the Australian Parliament.

I support the comments of the Australian Information and Privacy Commissioner, Mr Timothy Pilgrim, stating that any impact on privacy needs to be necessary, reasonable and proportionate, and that Privacy Impact Assessments are

¹ As viewed on 24 January 2018 at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/Espionage_FInterference/Submissions

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required to identify the exact nature of these impacts and to mitigate them where possible and appropriate. It is unclear if these essential Privacy Impact Assessments have been carried out, and thus it would seem that the Australian Parliament is not in a position to take an informed decision as to whether the new legislation includes measures which are necessary, reasonable and proportionate.

I particularly note the concerns of the Inspector General for Intelligence and Security, whose purpose “is to ensure that each intelligence agency acts legally and with propriety, complies with ministerial guidelines and directives, and respects human rights”, that the current drafting may “engender a punitive and defensive approach towards security compliance”.² This concern is echoed across other submissions. Contrary to the aim to expose activities to sunlight³, there is a shared concern that the Bill’s provisions will have the opposite effect and, as a result, introduce a chilling effect upon human rights.⁴

I note the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 amends, amongst other pieces of legislation, the *Telecommunications (Interception and Access) Act 1979*, which enables surveillance activities by permitting access to communications content for law enforcement and national security purposes, permitting Australian agencies to access data, and by requiring carriage services providers and licensed telecommunications carriers to set up systems to allow interception of communications. I note the purpose of the amendment is to ensure law enforcement agencies have access to telecommunications interception powers to investigate the serious offences established under the Bill.

These elements relate to matters that my mandate has been addressing in various forms since 2015. I respectfully draw the attention of the Australian Parliament to the importance of situating such laws within the evolving international debate on national security and human rights. In this context, it is important to emphasize that any new national legislation will not operate in a vacuum internationally.

As you will be aware, the right to privacy in recent years has attracted increasing attention from the United Nations General Assembly, the Human Rights Council and other human rights mechanisms, in particular with regard to policies and practices of many governments across the globe. One of the thematic action streams of my mandate addresses ‘security and surveillance’. This work has enabled the examination of the approach of countries around the globe to national security and related issues, as well as exposure to international research and the views of non-government actors.

In relation to the connection between national security and its expression in surveillance activities, the research and discussions with public policy leaders,

² Submission 13, Review of the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, Submission to the Parliamentary Joint Committee on intelligence and Security, The Hon Margaret Stone, Inspector General of Intelligence and Security, 22 January 2018, p. 10 and p. 9 respectively.

³ Commonwealth of Australia, House of Representatives, Parliamentary Debates, Bills, National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 Second Reading Speech Thursday, 7 December 2017, p. 13147.

⁴ Submissions to the Parliamentary Joint Committee on intelligence and Security, by the Law Council of Australia; Human Rights Watch; Australian Lawyers Alliance; Human Rights Law Centre; Australian Lawyers for Human Rights; and by citizens.

enforcement and intelligence communities, non-governmental organisations and civil society bodies undertaken by my mandate since 2015 have revealed an essential part of maintaining democratic systems – an aim of the Bill under discussion -, is to establish standards to guide both national and international law. To this end, the mandate's Thematic Action Stream 'Security and Surveillance' has co-facilitated the development 'from the ground up' of a draft legal instrument for guiding surveillance activities by United Nations Member States.⁵ In November 2017, I carried out an official country visit in France, where new developments in national security oversight were found to be mostly aligned with this initiative.

The sharing of these best practices by my mandate with the Australian Parliament could help further inform the debate over the reform of this legislative area, and I would be glad to work with the Australian Parliament to achieve this.

I would be happy to provide additional information and I would be available to discuss any matters with the Committee via video link, or when I visit Australia in July 2018 for a consultation event being conducted on my report to the United Nations General Assembly on Big Data and Open Data.

The Committee would likewise be welcome to send participants or observers to the International Intelligence Oversight Forum 2018 which is expected to be co-organised by my mandate in Portugal in autumn of 2018.

I am at your disposal for any other consultation or information

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I wish the Committee well with its Inquiry.

Please accept the assurances of my highest consideration.

Joseph Cannataci
Special Rapporteur on the right to privacy

⁵ A copy of the draft instrument is available at the website of the Office of the High Commissioner on Human Rights:
<http://www.ohchr.org/Documents/Issues/Privacy/DraftLegalInstrumentGovernmentLed.pdf>