# Chapter 1[1]

## New and continuing matters

1.1 In this chapter the committee has examined the following bills and legislative instruments for compatibility with human rights:

- bills introduced into the Parliament between 22 to 25 February 2021;
- legislative instruments registered on the Federal Register of Legislation between 28 January 2021 to 18 February 2021;[2] and

1.2 Bills and legislative instruments from this period that the committee has determined not to comment on are set out at the end of the chapter.

1.3 The committee comments on the following bills and seeks a response or further information from the relevant minister.

1 This section can be cited as Parliamentary Joint Committee on Human Rights, New and continuing matters, *Report 3 of 2021*; [2021] AUPJCHR 27.

2 The committee examines all legislative instruments registered in the relevant period, as listed on the Federal Register of Legislation. To identify all of the legislative instruments scrutinised by the committee during this period, select 'legislative instruments' as the relevant type of legislation, select the event as 'assent/making', and input the relevant registration date range in the Federal Register of Legislation's advanced search function, available at: https://www.legislation.gov.au/AdvancedSearch.

# Bills

## Online Safety Bill 2021[1]

## Online Safety (Transitional Provisions and Consequential Amendments) Bill 2021

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| **Purpose** | The Online Safety Bill 2021 seeks to create a new framework for online safety in Australia, and establish an eSafety Commissioner with the powers to investigate complaints and objections<br><br>The Online Safety (Transitional Provisions and Consequential Amendments) Bill 2021 seeks to repeal the *Enhancing Online Safety Act 2015*, make consequential amendments to various Acts and provide for transitional provisions relating to the eSafety Commissioner |
| **Portfolio** | Communications, Urban Infrastructure, Cities and the Arts |
| **Introduced** | House of Representatives, 24 February 2021 |
| **Rights** | Rights of women; rights of the child; privacy; freedom of expression; life; prohibition against torture and other cruel, inhuman or degrading treatment or punishment; and criminal process rights |

### Removal of, and disabling of access to, online content

1.4 This bill seeks to establish a new framework for online safety for people in Australia, enabling the minister to determine basic online safety expectations for social media services, electronic services (for example, SMS, chat or other communication services), or internet services (including those which allow individuals to access material online).[2]

1.5 The bill would also establish the office of the eSafety Commissioner (the Commissioner) to administer: a complaints system for cyber-bullying material targeting an Australian child and cyber-abuse material targeting an Australian adult; and a complaints and objection system for non-consensual sharing of intimate

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Online Safety Bill 2021 and Online Safety (Transitional Provisions and Consequential Amendments) Bill 2021, *Report 3 of 2021*; [2021] AUPJCHR 28.

2 Part 4. These terms are defined in clauses 13–14.

images (including images depicting nudity).[3] The Commissioner would also be empowered to enforce online safety by issuing blocking notices, link deletion notices, or app removal notices, to require the removal of online materials depicting abhorrent violent conduct, and certain pornographic and other materials depicting sexual or violent content. Non-compliance would be punishable by a range of civil penalty provisions and enforced through the adoption of enforcement powers contained in the *Regulatory Powers (Standard Provisions) Act* 2014. The bill would also empower the Commissioner to develop industry standards requiring compliance, and enable bodies and associations representing sections of the online industry to also develop their own self-regulatory industry codes.[4]

## Preliminary international human rights legal advice

### *Rights of the child, rights of women, rights to privacy and freedom of expression*

1.6 The bill seeks to enhance the safety of Australian children and adults on the internet by establishing a legislative framework for receiving and investigating individual complaints about online bullying and abuse, and the posting of intimate images without a person's consent. In particular, it seeks to facilitate the timely resolution of complaints about cyber-bullying of children. The bill also seeks to enhance online safety for Australians more generally by establishing mechanisms by which the Commissioner may require the speedy removal of violent and offensive material, and ensure that individuals do not view them. It also seeks to build-in flexibility to adapt the scheme to address emerging online harms, including by providing for the development of legislative instruments at a later time.

1.7 As such, the proposed scheme is likely to promote numerous human rights, including the right of women to be free from sexual exploitation, the rights of the child and the right to privacy and reputation. The United Nations (UN) Human Rights Council has stated that the human rights which people have offline must also be protected online.[5] International human rights law recognises that women are vulnerable to sexual exploitation, particularly online, and that States Parties have particular obligations with respect to combatting sources of such exploitation.[6] The UN Special Rapporteur on violence against women, has noted that:

> When women and girls do have access to and use the Internet, they face online forms and manifestations of violence that are part of the continuum

3 The office of the eSafety Commissioner already exists under the *Enhancing Online Safety Act 2015*. That legislation would be repealed with the intention of replacing the scheme with this bill and the associated Online Safety (Transitional Provisions and Consequential Amendments) Bill 2021.

4 Part 9, Division 7.

5 See, UN Human Rights Council, *Resolution 32/13 on the promotion, protection and enjoyment of human rights on the internet*, A/HRC/RES/32/13 (2016).

6 Convention on the Elimination of All Forms of Discrimination Against Women, article 6.

> multiple, recurring and interrelated forms of gender-based violence against women. Despite the benefits and empowering potential of the Internet and ICT [Information and Communication Technologies], women and girls across the word have increasingly voiced their concern at harmful, sexist, misogynistic and violent content and behaviour online. It is therefore important to acknowledge that the Internet is being used in a broader environment of widespread and systemic structural discrimination and gender-based violence against women and girls, which frame their access to and use of the Internet and other ICT.[7]

1.8 Children also have special rights under human rights law taking into account their particular vulnerabilities,[8] including the right to protection from all forms of violence, maltreatment or sexual exploitation.[9] The international community has recognised the importance of creating a safer online environment for children,[10] and noted the need to establish regulation frameworks which enable users to report concerns about content.[11] Indeed, in 2016 the UN Special Representative of the Secretary-General on Violence against Children observed that information and communication technologies can:

> be associated with serious risks of violence, including online sexual abuse and exploitation. Children can be exposed to cyberbullying, harmful information or abusive material, groomed by potential predators and subjected to abuse and exploitation, including through sexting, the production and distribution of images depicting child abuse and live web streaming. ICTs have significantly facilitated the production, distribution and possession of child abuse images and with rapidly developing technology, the number of perpetrators is growing.[12]

7 See, for example, Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective*, A/HRC/38/47 (2018) [14].

8 Convention on the Rights of the Child. See also, UN Human Rights Committee, *General Comment No. 17: Article 24* (1989) [1].

9 See, Convention on the Rights of the Child, articles 19, 34, and 36.

10 UNICEF and International Telecommunications Union, *Guidelines for industry on child protection* (2015) p. 8;

11 See, for example, International Telecommunications Union, *Guidelines for policy-makers on Child Protection Online* (2020).

12 UN Human Rights Council, *Annual report of the Special Representative of the Secretary-General on Violence against Children*, A/HRC/31/20 (2016) [44].

1.9 The Special Representative further stated that responses to violence against children must effectively detect and address online abuse, so that children can explore the online world with confidence and in safety.[13]

1.10 In addition, international human rights law recognises that the right to privacy must also be protected online. The right to privacy is multi-faceted. It protects against arbitrary and unlawful interferences with an individual's privacy and attacks on reputation.[14] It can also be considered as the presumption that individuals should have an area of autonomous development, interaction and liberty, a 'private sphere' with or without interaction with others, free from excessive unsolicited intervention by other uninvited individuals.[15]

1.11 While the proposed measure appears to promote these rights, in order to achieve its important objectives, it also necessarily engages and limits the right to freedom of expression. The right to freedom of expression includes the freedom to seek, receive and impart information and ideas of all kinds, either orally, in writing or print, in the form of art, or through any other media of an individual's choice.[16] It is not an absolute right. While the right to *hold* an opinion may never be permissibly limited under law,[17] the right to freedom of expression (that is, the freedom to *manifest* one's beliefs or opinions) can be limited.[18] For example, the International Covenant on Civil and Political Rights expressly provides that the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.[19] The International Covenant on the Elimination of Racial Discrimination also requires States to make it an offence to disseminate 'ideas based on racial superiority or hatred, incitement to racial

13 UN Human Rights Council, *Annual report of the Special Representative of the Secretary-General on Violence against Children*, A/HRC/31/20 (2016) [51].

14 There is international case law to indicate that this protection only extends to attacks which are unlawful. See *RLM v Trinidad and Tobago*, UN Human Rights Committee Communication No. 380/89 (1993); and *IP v Finland,* UN Human Rights Committee Communication No. 450/91 (1993).

15 UN Human Rights Council, *Report of the High Commissioner for Human Rights: the right to privacy in the digital age*, A/HRC/39/29 (2018) [5]; *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin*, A/HRC/13/37 (2009) [11].

16 International Covenant on Civil and Political Rights, article 19(2).

17 International Covenant on Civil and Political Rights, article 19(1).

18 Article 19(3) of the International Covenant on Civil and Political Rights states that the exercise of the right to freedom of expression carries with it special duties and responsibilities, and may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: for respect of the rights or reputations of others; for the protection of national security or of public order; or of public health or morals.

19 International Covenant on Civil and Political Rights, article 20(2).

discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin'.[20] These provisions are understood as constituting compulsory limitations on the right to freedom of expression.[21]

1.12 The right to freedom of expression may be permissibly limited where a measure seeks to achieve a legitimate objective, is rationally connected to (that is, effective to achieve) that objective, and is a proportionate means by which to achieve it.

1.13 As discussed at paragraph [1.6], this bill seeks to achieve a number of important objectives, with the overarching goal of enhancing the online safety of Australians. The statement of compatibility notes that children; young women; Indigenous Australians; and lesbian, gay, bisexual, transgender, queer or intersex (LGBTQI) people are particularly vulnerable to online harms.[22] It highlights that Indigenous and LGBTQI Australians experience online hate speech at more than double the national average.[23] It also notes that the sharing of intimate images without consent can be a component of domestic and family violence, noting that one in four women who reported the posting of such an image of themselves had also experienced other threatening behaviour from the perpetrator.[24] The explanatory memorandum also notes the ongoing issue of online child abuse material, noting that in September 2018, the Commissioner reported having undertaken more than 8,000 investigations dealing with 35,000 images and videos relating to this material.[25]

1.14 Several key components of the proposed scheme—relating to the removal of intimate images posted without consent, and material constituting cyber-bullying of an Australian child—would appear to be clearly effective to achieve that objective and, considering the nature of the content being targeted, would likely constitute a

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20 International Covenant on the Elimination of Racial Discrimination, article 4(a). Where each of the treaty provisions above refer to prohibition by law, and offence punishable by law, they refer to criminal prohibition. Although Australia has ratified these treaties, Australia has made reservations in relation to both the International Covenant on Civil and Political Rights and International Covenant on the Elimination of Racial Discrimination in relation to its inability to legislate for criminal prohibitions on race hate speech.

21 See, also, UN Special Rapporteur, F La Rue, *Annual Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion*, Human Rights Council, UN Doc A/HRC/14/23 (20 April 2010) [79(h)] available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/14/23 (accessed 4 November 2020).

22 Statement of compatibility, p. 56.

23 Statement of compatibility, p. 56.

24 Statement of compatibility, p. 53.

25 Explanatory memorandum, p. 16.

proportionate means by which to achieve it. The bill expressly provides that it does not apply to the extent that it would infringe any constitutional doctrine of implied freedom of political expression,[26] which is a useful safeguard. Further, with respect to public oversight of the Commissioner's functions, the bill requires the tabling of an annual report in Parliament.[27]

1.15 However, the bill also seeks to deal with further distinct types of online content, which necessitates an analysis of whether the proposed regulation of access to that content would constitute a proportionate means by which to achieve the important objectives of this bill in each case. This requires consideration of: the extent of the interference with the right to freedom of expression; whether the proposed limitation is sufficiently circumscribed; the presence of sufficient safeguards; and whether any less rights restrictive alternatives could achieve the same stated objective.

*Material constituting cyber-abuse of an Australian adult*

1.16 Part 7 of the bill would facilitate the removal of online material where the Commissioner is satisfied that the material is or was 'cyber-abuse' material targeted at an Australian adult.[28] That is, it is material which: an ordinary reasonable person would conclude is likely intended to have an effect of causing 'serious harm' to a particular Australian adult;[29] and which an ordinary reasonable person in the position of the Australian adult would regard as being, in all the circumstances, 'menacing, harassing, or offensive'.[30] The term 'offensive' is not defined in the bill. However, clause 8 provides that in determining whether an ordinary reasonable person in the position of the particular Australian adult would regard particular material to be 'offensive' in all the circumstances, matters to be taken into account include: the standards of morality, decency and propriety generally accepted by reasonable adults; the literary, artistic or educational merit (if any) of the material; and the general character of the material (including whether it has a medical, legal or scientific character).[31] The explanatory memorandum states that in assessing this, the Commissioner may consider the context in which the conduct occurs, including whether the person has been targeted because of a personal characteristic (such as their race, gender, mental health condition, or family violence situation).[32] The

26 Part 16, clause 233.

27 Part 11, clause 183.

28 The term 'cyber-abuse material targeted at an Australian adult' is defined in Part 1, clause 7.

29 The term 'serious harm' is defined in clause 5 to mean serious physical harm or serious harm to a person's mental health (being serous psychological harm and serious distress), whether temporary or permanent.

30 Part 1, subclause 7(1).

31 Part 1, clause 8.

32 Explanatory memorandum, p. 70.

statement of compatibility further provides that this higher threshold for cyber-abuse materials (when compared with cyber-bullying material against children) recognises the higher level of resilience to be expected of an adult:

> For adults, it is only when the material crosses a threshold well beyond reasonable commentary or expression of opinion and into the realm of intentional, serious harm, and being menacing, harassing or offensive, that the Bill provides a mechanism for that material to be taken down from a platform.[33]

1.17 The term 'offensive' may be employed in relation to conduct with effects that range from slight to severe, which raises some questions as to the potential breath of materials which could be captured by this provision, as a matter of statutory interpretation. The right to freedom of expression, to be meaningful, protects both popular and unpopular expression and ideas, including expression that may be regarded as deeply offensive (so long as it does not constitute hate speech).[34] The term 'offensive' has been the subject of extensive consideration in existing areas of Australian law. The High Court of Australia has noted that, 'offensiveness is a protean concept which is not readily contained unless limited by a clear statutory purpose and other criteria of liability'.[35] It has further stated that the modern approach to interpretation—particularly in the case of general words—requires that the context be considered in the first instance: '[w]hilst the process of construction concerns language, it is not assisted by a focus upon the clarity of expression of a word to the exclusion of its context'.[36]

1.18 In *Monis v R*, the High Court considered the meaning of the term 'offensive' within the context of the alleged offence of using a postal service in a way that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive.[37] In that instance, Justices Crennan, Kiefel and Bell guided that the terms 'menacing, harassing or offensive' must be considered together:

> It is true that a communication which has the quality of being menacing or harassing can be seen to be personally directed and deliberately so. An offensive communication may have those qualities; it may

33 Statement of compatibility, p. 57.

34 See UN Human Rights Committee, *General Comment 34: Freedom of opinion and expression* (2011) [11].

35 *Monis v R; Droudis v R* [2013] HCR 4 [47] per French CJ. Gleeson CJ (dissenting) in *Coleman v Power* [2004] HCA 39 further commented that concepts of what is offensive will vary within time and place, and may be affected by the circumstances in which the relevant conduct occurs, at [12].

36 *Monis v R; Droudis v R* [2013] HCR 4 [309] (per Crennan, Kiefel and Bell JJ). See also *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 [315] per Mason J; and *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 [381].

37 Pursuant to section 471.12 of the *Criminal Code Act 1995*.

> not…Importantly, the grouping of the three words and their subjection to the same objective standard of assessment for the purposes of the offences in s 471.12 suggests that what is offensive will have a quality at least as serious in effect upon a person as the other words convey. The words "menacing" and "harassing" imply a serious potential effect upon an addressee, one which causes apprehension, if not a fear, for that person's safety. For consistency, to be "offensive", a communication must be likely to have a serious effect upon the emotional well-being of an addressee.[38]

1.19 Section 18C of the *Racial Discrimination Act 1975* similarly prohibits an act done on the basis of race or colour that is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate. In this context, having had regard to the collective phrase 'offend, insult, humiliate or intimidate', Australian courts have considered that this establishes an objective test of whether the act is reasonably likely to have a 'profound and serious effect', in all the circumstances, and is not to be likened to mere slights.[39]

1.20 This jurisprudence indicates that the term 'offensive' (which itself may be capable of capturing conduct with effects that range from slight to severe) should, where relevant, and as a matter of modern statutory interpretation, be read in relation to the surrounding terms in the statute. In this instance, the same interpretative approach would appear to also necessitate consideration of the intention to have the effect of causing 'serious harm' to a particular Australian adult. Accordingly, the definition of 'cyber-abuse material targeted at an Australian adult' may well be sufficiently constrained such that any interference on the right to freedom of expression with respect to this particular mechanism may be permissibly limited. Further, clause 7 would permit the development of further legislative rules, which would appear to enable the definition of cyber-abuse to be further narrowed in the future.[40]

1.21 In addition, the Online Safety (Transitional Provision and Consequential Amendments) Bill 2021 seeks to increase the penalty for an offence of using a carriage service to menace, harass or cause offence, from three years imprisonment to five years imprisonment.[41] The explanatory memorandum states that this offence captures conduct including serious cyber-abuse, including in cases where there is family violence, and that the increased penalty will ensure that community

38 *Monis v R; Droudis v R* [2013] HCR 4 [310].

39 *Creek v Cairns Post* [2001] FCA 1007 [16]. See also, *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105 [131]; *Jones v Scully* (2002) 120 FCR 243 [102]; and *Eatock v Bolt* (2011) 197 FCR 261 at [267]-[268].

40 The statement of compatibility identifies that this is the intended purpose of subclause 7(c), relating to the definition of 'cyber-bullying material targeted at an Australian child'. See, p. 57.

41 See Criminal Code Act 1995, section 474.17.

expectations are met and such conduct is adequately deterred.[42] In light of the judicial guidance as to the correct interpretation of the terms 'menacing, harassing or offensive' as set out at paragraph [1.18], it would appear that increasing the penalty for this offence may constitute a permissible limit on the right to freedom of expression.

*Material relating to abhorrent violent conduct*

1.22 Part 8 of the bill would enable the Commissioner to either request or require that an internet service provider (ISP) block access to material that promotes, incites, instructs or depicts 'abhorrent violent conduct',[43] if the Commissioner is satisfied that the availability of the material online is likely to cause significant harm to the Australian community.[44] This necessarily limits the right to freedom of expression (while also promoting the rights set out above). The bill provides that a blocking request or requirement may specify that an internet service block domain names, Uniform Resource Locators (URLs) or Internet Protocol (IP) addresses providing access to the material, and may remain in force for up to three months (subject to further renewal).[45] The term 'significant harm' is not defined in the bill, however in reaching this determination the Commissioner must have regard to the nature of the material, the number of end-users who are likely to access it, and any other matters they consider relevant.[46] Further, some materials would be exempt, and the Commissioner would have no power to request or require that such material be blocked (including material that must be available in order to monitor compliance with or enforce a law; material necessary for scientific, medical, academic or historical research; material that relates to a news report that is in the public interest and made by a person working in a professional capacity as a journalist; and where the accessibility of the material is for the purpose of lawfully advocating a change to laws or policies).[47]

1.23 The explanatory memorandum states that this scheme is intended to protect the Australian community from the viral online distribution of terrorist and extreme violence material in the case of an 'online crisis event', such as the video created by the perpetrator of the March 2019 terrorist attack in New Zealand.[48] It states that it

42 Explanatory memorandum, pp. 11–12.

43 A person engages in 'abhorrent violent conduct' if they: engage in a terrorist act; murder (or attempt to murder) another person; or torture, rape or kidnap another person. *Criminal Code Act 1995*, section 474.32.

44 Part 8, clause 95.

45 Part 8, clauses 95 and 99.

46 Part 8, subclauses 95(4) and 99(4).

47 Part 8, clause 104.

48 Statement of compatibility, p. 54; and explanatory memorandum, p. 116.

is not intended for the Commissioner to be able to use this power for material that has limited availability or distribution.[49] It also states that given the requirement of the Commission to be satisfied that the availability of the material online is likely to cause significant harm to the Australian community, the scheme is not intended to capture certain content, such as footage of violent sporting events or medical procedures.[50] As noted above, the right to freedom of expression may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective. Part 8 is clearly intended to provide an important mechanism for the speedy removal of material relating to violent conduct with the potential to traumatise or radicalise those who view it. This would clearly constitute a very important and legitimate objective, and the measure would appear effective to achieve this objective.

1.24 However, some questions arise as to whether this scheme would constitute a proportionate means by which to achieve this objective, including questions as to the scope of the materials which would be exempt from this scheme under clause 104. Clause 104 provides that the Commissioner would not, for example, have the power to require that material depicting abhorrent violent conduct be blocked where it relates to a news report that is in the public interest, and was made by a person working in a professional capacity as a journalist. However, the term 'public interest' is undefined, and, noting that it may be subject to an evolving interpretation, it is not clear what matters (if any) the Commissioner would be required to have regard to in making this assessment. Further, this exemption only applies where the content was created by a person working in a professional capacity as a journalist. Given that it may not always be immediately apparent who made the material in question, it is not clear whether, for example, raw video footage of a violent conflict filmed by a non-journalist could be blocked on the basis that it is likely to cause significant harm to the Australian community, even if it may inform journalistic analysis of such conflict. This is a significant consideration with respect to a limitation on the right to freedom of expression, noting the particular importance placed on the role of a free press under human rights law.[51] Further, while the Commissioner would have no power to block access to material where the accessibility is for the purpose of advocating the lawful procurement of a change to any matter established by law, policy or practice in Australia or overseas, it is not clear how this may be applied in practice (including where material could be accessed for a number of purposes). For example, it is not clear whether this

49 Explanatory memorandum, p. 116.

50 Explanatory memorandum, p. 117.

51 UN Human Rights Committee, *General comment no. 34, Article 19, Freedoms of opinion and expression* (2011) [13].

exemption would prevent the Commissioner from blocking video footage of violent police misconduct against a member of the public.

1.25 Questions also arise as to the breadth of what a blocking notice may require under Part 8. Subclauses 95(2) and 99(2) state that the blocking notice may request the provider to take one or more specified steps to disable access to the material. What those steps may be are not specified in the bill. Subclauses 95(2) and 99(2) set out examples of such steps (such as blocking domain names, URLs and IP addresses that provide access to the material), but these are not exhaustive lists. The explanatory memorandum states that it is intended for these powers to work in tandem with any protocol developed by the Commissioner describing how they will provide a blocking request or notice, how affected parties will be notified, and the process of removing blocks,[52] however there is no such information on the face of the bill. The bill would require only that the Commissioner must have regard to whether their other powers could be used instead of the blocking power.[53] If requiring the removal of an individual piece of content (or class of content) would be effective to achieve the aims of the blocking notice, it is not clear if the Commissioner would only be empowered to require this or could still require the blocking of an entire domain or URL (noting that a website could host a wide range of unrelated material). This raises questions as to the scope of potential blocking requests or orders.

1.26 Finally, the bill states explicitly that procedural fairness does not need to be observed in issuing a blocking notice.[54] The explanatory memorandum explains that procedural fairness is excluded to enable the Commissioner to issue a request as soon as possible to quickly block harmful material.[55] While it is clear that giving ISPs and owners of a website a chance to make submissions regarding the action would delay the blocking process, it is not clear why Part 8 could not provide for the issue of an interim blocking notice for a short duration—with no requirement for procedural fairness—but which can be followed by a further blocking notice of longer duration. Procedural fairness could then be afforded when making the longer-term blocking notice, without compromising the objective of having the offending material urgently blocked. The exclusion of procedural fairness, and the opportunity to hear from affected parties as to the nature of the material to be blocked, may make it more likely that a broader range of material than is necessary may be blocked. Further, although the Commissioner would be empowered to revoke a blocking request or notice,[56] the bill provides no criteria on which this decision may be made, and there

52 Explanatory memorandum, p. 116

53 Part 8, subclauses 95(5) and 99(5).

54 Part 8, subclauses 95(3) and 99(3).

55 Explanatory memorandum, p. 117.

56 Part 8, clauses 97 and 101.

is no requirement in the bill that the Commissioner revoke the blocking notice or request should circumstances relevantly change prior to the expiration of the notice. The bill does provide for review of a decision to give a blocking notice by the Administrative Appeals Tribunal,[57] which is a useful safeguard in terms of providing access to external review. However, it is noted this would only take place after an internet service provider had already been required to comply with the blocking notice, and the right to freedom of expression had been limited.

1.27 In order to assess the proportionality of this measure with the right to freedom of expression, further information is required, in particular:

(a) what is meant by the term 'significant harm' and what guidance would be provided to the Commissioner in determining what reaches the threshold of 'significant harm' (as opposed to 'harm') in practice;

(b) whether material which could be used to inform journalistic analysis of violent incidents (for example, raw protest footage filmed by participants, or footage of violent police misconduct) but which was not itself made by a journalist, would be exempt from removal by the Commissioner;

(c) what guidance would be provided to the Commissioner, and what factors would they take into consideration, in determining whether access to material is in the public interest;

(d) what range of steps the Commissioner could specify in a blocking notice or request (beyond those examples in subclauses 95(2) and 99(2)), and what limits (if any) are there on the steps which the Commissioner could request or require;

(e) why the bill does not specify that the Commissioner may require the removal of an individual piece of content (or class of content), rather than requiring the blocking of an entire domain or URL, where satisfied that this would be effective;

(f) why it would not be as effective to provide for an interim blocking notice of short duration—with no requirement for procedural fairness—together with the power to issue a blocking notice of longer duration, but only where the internet service provider or other relevantly affected person has been provided with the opportunity to make a submission as to the content in question; and

(g) why the Commissioner would not be required to revoke a blocking notice or request should circumstances relevantly change prior to its original expiration.

57 Part 16, subclause 220(13).

*Regulation of online content - class 1 and 2 materials*

1.28 Part 9 of the bill would enable the Commissioner to require that a social media service, electronic service, designated internet service, or a hosting service provider remove, or otherwise deny access to, two classes of material on their services:

- 'Class 1 material' refers to a film or publication (or the contents of such), computer game, or other material which has been refused classification (or classified 'RC') under the *Classification (Publications, Films and Computer Games) Act 1995*,[58] or which would likely be refused classification.[59]
- 'Class 2 material' which refers to:
  - material that has been, or would likely be, classified X 18+ and category 2 restricted material (referred to in the explanatory memorandum as mainstream pornography);[60] and
  - material depicting violence, implied sexual violence, simulated sexual activity, coarse language, drug use and nudity that is not suitable for

58 A film, publication or computer game will be classified as 'RC' where it: describes, depicts, expresses or otherwise deals with matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in such a way that it offends against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that it should not be classified; or describes or depicts in a way that is likely to cause offence to a reasonable adult, a person who is, or appears to be, a child under 18 (whether the person is engaged in sexual activity or not); or promotes, incites or instructs in matters of crime or violence. National Classification Code (May 2005), sections 2–4. With respect to films see also Guidelines for the Classification of Films 2012, which provides that a film will be classified RC where it contains bestiality; or gratuitous exploitative or offensive depictions of activity accompanied by fetishes or practices which are considered abhorrent.

59 Part 9, clause 106.

60 The catch-all term 'mainstream pornography' is used in the explanatory memorandum, at page 124, to refer to this content. That is, a film (or contents of), or another material, which has been, or would likely be, classified X 18+ (meaning that it contains real depictions of actual sexual activity between consenting adults in which there is no violence, no sexual violence, sexualised violence, coercion, sexually assaultive language, or fetishes or depictions which purposefully demean anyone involved in that activity for the enjoyment of viewers, in a way that is likely to cause offence to a reasonable adult; and which is unsuitable for a minor to see). Alternatively, a publication that is (or would be) classified 'Category 2 restricted' (meaning that it explicitly depicts sexual or sexually related activity between consenting adults in a way that is likely to cause offence to a reasonable adult; or depicts, describes or expresses revolting or abhorrent phenomena in a way that is likely to cause offence to a reasonable adult and is unsuitable for a minor to see or read). See, National Classification Code (May 2005).

persons under 18 years (hereafter referred to as 'less serious Class 2 material').[61]

1.29 In the case of Class 1 material (including, for example, child exploitation material), a person would be able to complain to the Commissioner if they had reason to believe that an end-user in Australia could access that content online, including via an instant messaging or SMS service.[62] The Commissioner would be empowered to require that, within 24 hours of the notice: an online service take all reasonable steps to ensure the removal of that material (or cessation of its hosting);[63] an internet search engine service cease providing a link to the material;[64] or an app distribution service cease enabling Australian end-users from downloading an app that facilitates the posting of Class 1 material.[65]

1.30 In the case of mainstream pornography, a person would be able to complain to the Commissioner if they had reason to believe that an end-user in Australia could access that content online, including via an instant messaging or SMS service,[66] regardless of whether or not access to that content was restricted in some way. The Commissioner would only be empowered to take action with respect to content that was posted on, or otherwise hosted by, a service from Australia. They could require that such a service must take all reasonable steps to ensure the removal of that material (or cessation of its hosting) within 24 hours.[67]

1.31 As to less serious Class 2 material, a person would be able to complain to the Commissioner if they had reason to believe that an end-user in Australia could access that content online, including via an instant messaging or SMS service,[68] *and* that

61 That is, a film (or contents of), a computer game which has been, or would likely be classified R 18+ (meaning that it is unsuitable for viewing or playing by a minor); or a publication (or contents of) which has been (or would likely be) classified 'Category 1 restricted' (meaning that it explicitly depicts nudity, or describes or impliedly depicts sexual or sexually related activity between consenting adults, in a way that is likely to cause offence to a reasonable adult; or describes or expresses in detail violence or sexual activity between consenting adults in a way that is likely to cause offence to a reasonable adult; or is unsuitable for a minor to see or read). See, National Classification Code (May 2005).

62 Part 3, paragraph 38(1)(a).

63 Part 9, clauses 109–110.

64 Part 9, clause 124.

65 Part 9, clause 128.

66 Part 3, paragraph 38(1)(b).

67 Part 9, clause 114 and 120.

68 Part 3, subclause 38(2)

access was not subject to a 'restricted access system'.[69] The Commissioner would only be empowered to take action with respect to content that was posted on, or otherwise hosted by, a service from Australia. They could issue the service with a remedial notice, requiring that, within 24 hours, they take all reasonable steps to ensure that they either cease hosting the material, or that access to the material be subject to a restricted access system.[70]

1.32 In addition to promoting the rights of women, the child and privacy (as set out above), blocking access to such material necessarily limits the right to freedom of expression. As noted above, the right to freedom of expression may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.33 The statement of compatibility states that this scheme deals with seriously harmful content, access to which, if unrestricted, would be harmful to Australians, particularly children.[71] The objective of restricting access to seriously harmful content would likely be legitimate for the purposes of international human rights law.

1.34 It must then be demonstrated that these limitations are rationally connected to the objective sought to be achieved. The key question is whether the relevant measure is likely to be effective in achieving the objective being sought. With respect to the more serious materials within these two classes—including child abuse material, child sexual exploitation material, promotion of paedophile activity, and material advocating a terrorist activity—it is clear that restricting access to these materials would be effective to reduce the risk of harm caused by continued access to them, because those materials are themselves harmful to the viewer, and to persons involved in their production (for example, children being abused). However, it is not clear that other materials, particularly those that fall within Class 2 would necessarily be harmful to adult viewers. In particular, it is not clear that an Australian adult would necessarily experience any harm having viewed material depicting sexual activity between consenting adults,[72] including materials constituting non-

69 Clause 108 provides that the Commissioner may, by legislative instrument, declare that a specified 'access-control system' is a restricted access system. Clause 5 defines an 'access-control system' as a system under which persons seeking access to the material have a password, or a PIN, or some other means of limiting access by other persons to the material.

70 Part 9, clause 120.

71 Statement of compatibility, p. 58.

72 In addition, clause 114 (removal notices with respect to mainstream pornography removal on a service provided from Australia) would facilitate the removal of pornography on a service provided in Australia. Consequently, it is not clear whether this power would have a disproportionate impact on sex worker and related businesses in Australia, and their capacity to work.

mainstream, yet still consensual, sexual content.[73] No information is provided to demonstrate that having access to mainstream pornography online, depicting sex between consenting adults, causes harm to adult Australians. Consequently, further information is required as to whether providing for the removal of content depicting sex between consenting adults from the internet would be effective to protect adults from some kind of harm. Further information is also required to demonstrate that where access to material is restricted, having this material available online could cause harm to Australian children.

1.35 As to whether this scheme would constitute a proportionate means by which to achieve its objective, it is necessary to consider: the extent of the interference with the right to freedom of expression; whether the proposed limitation is sufficiently circumscribed; the presence of sufficient safeguards; and whether any less rights restrictive alternatives could achieve the same stated objective. In this respect, it is significant that this scheme would apply to a broad range of content. Some of the materials would clearly have the capacity to cause harm to a viewer (for example, child exploitation material). However, it is not clear that other materials captured by this scheme (for example, pornography depicting consensual sex between adults) could cause harm to an adult viewer. The Commissioner would be empowered to require the removal of Class 1 and 2 materials, including mainstream pornographic content, material depicting nudity.[74] In light of the question at paragraph [1.34] as to what evidence there is that access to mainstream adult pornographic content exposes adults to harm, it is unclear why the Commissioner is not solely empowered to only require that mainstream pornographic material must be accessible via a restricted access system, rather than enabling its removal in its entirety, in order to achieve the objective of protecting Australians—and particularly children—from exposure to harmful sexual content.

1.36 Further, some questions arise as to whether the Commissioner's discretion to require the removal of materials could not be further curtailed, without reducing their capacity to achieve the stated objective. The bill could, for example, require that the Commissioner must consider the purpose for which that content was published (for example, an educative, academic, medical, or health-related purpose); whether it would be in the public interest to remove material (on the basis that it

73 Noting that this may necessitate a subjective judgment as to what is mainstream or otherwise harmful sexual activity. In this regard, questions also arise as to whether material which is, or would likely be, classified RC (that is, Class 1 material), could capture non-mainstream sex between consenting adults (that is, material which describes, depicts, expresses or otherwise deals with sex in such a way that it offends against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that it should not be classified).

74 Paragraphs 119(2)(f) and 120(1)(g) would, as matter of statutory interpretation, appear to permit the Commissioner to require that a service *either* restricted access to material behind a restricted access system *or* require that that it be removed.

may be unsuitable for a child to view, but may be reasonable for an adult to have access to); and how the interests of affected parties and end users would be affected. In addition, noting that the definition of a 'restricted access system' is potentially broad, it is not clear what kind of system the Commissioner could declare for the purposes of clause 108. This is relevant to the proportionality of this measure because if a system required, for example, the provision of personal information in order to log in, this may deter end-users in practice.

1.37 Lastly, while a decision by the Commissioner could be appealed to the Administrative Appeals Tribunal for review,[75] it would be less rights restrictive to provide for the issue of an interim removal, link-deletion, app removal, or remedial notice, followed by a further order only once the relevant service had been given the opportunity to make submissions as to the appropriateness of the content remaining accessible. As set out at paragraph [1.26], this would provide a mechanism for procedural fairness in practice.

1.38 In order to assess the proportionality of this measure with the right to freedom of expression, further information is required, and in particular:

(a) what evidence demonstrates that the full range of materials which would fall within Classes 1 and 2 (in particular, material depicting consensual sex between adults) would be harmful to adult end-users;

(b) why the Commissioner would be empowered to require the removal of mainstream pornography, rather than requiring that it must be accessible only via a restricted access system;

(c) why the bill could not require that the Commissioner must consider the purpose for which that content was published (for example, an educative, academic, medical, or health-related purpose); whether it would be in the public interest to remove material (on the basis that it may be unsuitable for a child to view, but may be reasonable for an adult to have access to); and how the interests of affected parties and end users would be affected;

(d) what types of systems the Commissioner could declare a 'restricted access system', and whether these would require the provision of personal information in order to log in; and

(e) in order to ensure procedural fairness, why this scheme could not instead provide for the issue of an interim removal, link-deletion, app removal, or remedial notice, followed by a further order only once the relevant service had been given the opportunity to make submissions as to the appropriateness of the content remaining accessible.

75 Part 16, subclauses 220(11) and (14)–(16).

## Committee view

**1.39 The committee notes the Online Safety Bill 2021 seeks to create a new framework for ensuring online safety in Australia and provide a new legislative authority for the Australian eSafety Commissioner, empowering them to investigate complaints and objections in relation to harmful online content against children and adults, and to require that certain harmful content must be removed, or access to it disabled or restricted. The committee notes that the Online Safety (Transitional Provisions and Consequential Amendments) Bill 2021 would repeal the existing legislative authority for the Commissioner, as well as increasing the criminal penalties associated with two offences for using a carriage service to menace, harass or cause offence.**

**1.40 The committee notes that, in doing so, the Online Safety Bill 2021 is likely to promote numerous human rights. The committee considers that ensuring the safety of Australians online is a significant and evolving challenge, and notes that some Australians—including women and children—are particularly vulnerable to harms online, including sexual exploitation. The committee notes that the extent of the eSafety Commissioner's work to date demonstrates the vital importance of their role, noting in particular that in September 2018, the eSafety Commissioner reported having undertaken more than 8,000 investigations into child abuse content, representing approximately 35,000 images and videos referred for removal. Consequently, the committee considers that this bill is likely to promote the rights of the child, including by protecting them from exposure to harmful materials online, and from cyber-bullying material. The committee also considers that the bill is likely to promote the right of women to be free from sexual exploitation, and the right to privacy and reputation, including by providing for the removal of cyber-abuse material targeting an Australian adult, and of non-consensual intimate images.**

**1.41 The committee also notes that, by regulating and disabling access to certain harmful online content, this bill necessarily engages and limits the right to freedom of expression. The committee notes that the right to freedom of expression is not absolute, and may be permissibly limited where a limitation addresses a legitimate objective, is rationally connected to (that is, effective to achieve) that objective, and a proportionate means of doing so. The committee considers that the bill clearly seeks to achieve the important and legitimate objective of enhancing online safety for Australian adults and children in a number of ways, including by providing for the speedy removal of intimate images posted without the subject's consent, or material which constitutes cyber-bullying of an Australian child, and cyber-abuse of an Australian adult. The committee considers that these measures in general appear to permissibly limit the right to freedom of expression.**

**1.42 However, the committee notes that some clarification is required as to the potential scope of information, and means of regulating access to it, in relation to**

**abhorrent online content, and some adult sexual content, in order to assess whether the proposed limitations with respect to blocking access to this content is proportionate to the objectives of the bill.**

**1.43 The committee has not yet formed a concluded view in relation to this matter. It considers further information is required to assess the human rights implications of this bill, and as such seeks the minister's advice as to the matters set out at paragraphs [1.27] and [1.38].**

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## Disclosure of information about a complaint of cyber-bullying against children

1.44 As noted above, the bill would establish a complaints mechanism for material which an ordinary person would conclude is likely intended to have the effect of seriously threatening, intimidating, harassing or humiliating an Australian child.[76] Information gathered by the Commissioner in investigating this complaint can be disclosed to a number of specified bodies and persons, including to a teacher or school principal, or to a parent or guardian of an Australian child, if the Commissioner is satisfied the information will assist in the resolution of the complaint.[77]

## Preliminary international human rights legal advice

### *Rights of the child*

1.45 Enabling the Commissioner to share information about a complaint of cyber-bullying with teachers, principals, parents and guardians, engages the rights of the child. Australia is required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration.[78] This requires legislative bodies to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.[79] Children also have the right to privacy.[80] States Parties are also required to assure to a child capable of forming his or her own views the right to express those views freely in all matters affecting the child.[81] The views of the child must be given due weight in accordance with the age and maturity of the child.

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76 Part 1, clause 30.

77 Part 15, clauses 213 and 214.

78 Convention on the Rights of the Child, article 3(1).

79 UN Committee on the Rights of Children, *General Comment 14 on the right of the child to have his or her best interest taken as primary consideration* (2013).

80 Convention on the Rights of the Child, article 16.

81 Convention on the Rights of the Child, article 12.

1.46 The statement of compatibility states that the bill generally supports the best interests of the child by providing mechanisms so that they are protected from seriously harmful content, and that it is designed to protect persons from exploitation, violence and abuse.[82] In relation to this specific disclosure provision it recognises that it may limit the right to privacy, but notes:

> Resolution of a complaint by teachers or principals, or parents or guardians, has advantages over resolution through the more formal regulatory channels available under the Bill, particularly dealing with instances of cyber-bullying that might be of a less serious nature. These clauses facilitate resolution of complaints in such a manner. By facilitating resolution of complaints outside of the more formal channels, the Bill is also intending to minimise the adverse impacts of its provisions on the right to freedom of expression, discussed above.[83]

1.47 As such, it appears likely that these measures could have the effect of promoting the rights of the child, insofar as the disclosure may help to quickly resolve the cyberbullying complaint. However, if the personal information relating to the child's complaint is shared with teachers and principals, and parents and guardians (be it the parent or guardian of the complainant or the parent or guardian of the child accused of cyber-bullying), without the child's consent[84] and against their wishes, this may limit the child's right to privacy, the obligation to take into account the best interests of the child and their right to express their views in matters that affect them. Most of the rights of the child may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

1.48 It is clear that the objective of the measure is to assist in resolving complaints of cyber-bullying which would constitute a legitimate objective for the purposes of international human rights law, and disclosing information to teachers, principals, parents and guardians would appear to be rationally connected to this objective. A key aspect of whether a limitation on a right can be justified is whether the limitation is proportionate to the objective being sought. In this respect, it is necessary to consider a number of matters including whether there are sufficient safeguards and whether any less rights restrictive alternatives could achieve the same stated objective.

82 Statement of compatibility, p. 64.

83 Statement of compatibility, p. 61.

84 It is noted that clause 215 provides a separate ground for disclosure of information that relates to the affairs of a person if that person has consented to the disclosure, which indicates that consent is not a requirement for disclosure to teachers, principals, parents and guardians under clauses 213 and 214.

1.49 The bill provides that the Commissioner must, as appropriate, have regard to the Convention on the Rights of the Child in the performance of their functions.[85] This may operate to ensure the rights of the child are respected in practice.[86] However, it is not clear if this broad requirement to 'have regard to' the Convention when performing their functions, would require the Commissioner to consider the rights of the child as a primary consideration when considering whether to disclose information to teachers, principals, parents and guardians. It is also not clear whether it would require the Commissioner to give due weight to the child's wishes in accordance with the age and maturity of the child before authorising disclosure of the information.

1.50 In order to assess the compatibility of this measure with the rights of the child, further information is required as to:

(a) whether the requirement for the Commissioner to have regard to the Convention on the Rights of the Child in the performance of their functions will require the Commissioner to consider the rights of the child as a primary consideration, and give due weight to the child's wishes in accordance with the age and maturity of the child, when considering whether to disclose information to teachers, principals, parents and guardians; and

(b) whether the rights of the child would be better protected if clauses 213 and 214 were amended to expressly provide that the Commissioner may disclose information to teachers, principals, parents and guardians where to do so would be in the best interests of the child complainant and, after first giving due weight to the child's wishes in accordance with the age and maturity of the child.

## Committee view

**1.51 The committee notes that the bill would enable the Commissioner investigating a complaint of cyber-bullying against a child to disclose information gathered in investigating that complaint to teachers, school principals, parents or guardians, if satisfied the information will assist in the resolution of the complaint.**

**1.52 The committee considers that if the disclosure may help to quickly resolve the cyberbullying complaint, these powers could have the effect of promoting the rights of the child. However, the committee notes that if the personal information relating to the child's complaint is shared against the child's wishes this may limit the child's right to privacy, the obligation to take into account the best interests of the child and their right to express their views in matters that affect them. Many of**

85 Part 1, clause 24.

86 Part 1, clause 24.

**the rights of the child may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate.**

**1.53 The committee has not yet formed a concluded view in relation to this matter. It considers further information is required to assess the human rights implications of this measure, and as such seeks the minister's advice as to the matters set out at paragraph [1.50].**

## Disclosure of information to authorities of foreign countries

1.54 The bill also provides that any information obtained by the Commissioner using these new powers[87] can be disclosed to a number of listed authorities, including certain authorities of a foreign country where the Commissioner is satisfied that the information will enable or assist the foreign authority to perform or exercise their relevant functions or powers.[88] The relevant authorities of the foreign countries are those that are responsible for regulating matters or enforcing laws of that country relating to the safe use of certain internet services and material that is accessible to the end-users of certain internet services. The Commissioner may impose conditions to be complied with when disclosing such information.[89]

## Preliminary international human rights legal advice

### *Rights to privacy and life, and prohibition on torture, cruel, inhuman or degrading treatment or punishment*

1.55 By authorising the disclosure of information obtained by the Commissioner, including personal information, to the authorities of foreign countries for the purpose of assisting them to perform or exercise any of their functions or powers, the measure engages and limits the right to privacy. The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information.[90] It also includes the right to control the dissemination of information about one's private life.

87 Part 15, clause 207.

88 Part 15, paragraphs 221(1)(h) and (i).

89 Part 15, subclause 212(2).

90 International Covenant on Civil and Political Rights, article 17. Every person should be able to ascertain which public authorities or private individuals or bodies control or may control their files and, if such files contain incorrect personal data or have been collected or processed contrary to legal provisions, every person should be able to request rectification or elimination: UN Human Rights Committee, *General Comment No. 16: Article 17* (1988) [10]. See also, *General Comment No. 34 (Freedom of opinion and expression)* (2011) [18].

1.56 The right to privacy may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective. The statement of compatibility acknowledges that the general disclosure powers in clause 212 engage the right to privacy (without specifically referring to the disclosure to the authorities of foreign countries). It states that this provision is necessary to allow each of the listed authorities to 'function to its maximum extent to protect the best interests of affected children and victims of cyber-abuse'.[91] Enhancing the ability of foreign authorities to protect the interests of children and victims of cyber-abuse would appear to constitute a legitimate objective for the purpose of international human rights law, and authorising the sharing of information obtained by the Commissioner would appear to be rationally connected to that objective. However, questions remain as to whether the measure is proportionate to achieving that objective.

1.57 In order to be proportionate, a limitation on the right to privacy should only be as extensive as is strictly necessary to achieve its legitimate objective and must be accompanied by appropriate safeguards.[92] The statement of compatibility states that to ensure adequate protection of privacy, clause 212 empowers the Commissioner to impose conditions to be complied with in relation to information disclosed under this clause, which 'may include, for example, conditions that prevent further disclosure to third parties'.[93] This may operate to help to safeguard the right to privacy in practice. However, the effectiveness of this as a safeguard will likely depend on the specific conditions (particularly whether they include privacy protections) and their enforceability. In addition, the bill provides only that the Commissioner 'may' impose conditions in relation to the information disclosed – there is no legislative requirement that privacy protections are required before information is disclosed. It is noted that Australian privacy protections would not apply once the information is disclosed to the foreign authority.

1.58 In addition, to the extent that the measure would authorise the disclosure of personal information to foreign authorities responsible for enforcing laws of the foreign country, where this may be used to investigate and convict a person of an offence to which the death penalty applies, the right to life may be engaged and limited. The right to life imposes an obligation on Australia to protect people from being killed by others or identified risks.[94] While the International Covenant on Civil

91 Statement of compatibility, p. 61.

92 The United Nations (UN) Human Rights Committee has stated that legislation must specify in detail the precise circumstances in which interferences with privacy may be permitted: *NK v Netherlands*, UN Human Rights Committee Communication No.2326/2013 (2018) [9.5].

93 Statement of compatibility, p. 61.

94 International Covenant on Civil and Political Rights, article 6. The right should not be understood in a restrictive manner: UN Human Rights Committee, *General Comment No. 6: article 6 (right to life)* (1982) [5].

and Political Rights does not completely prohibit the imposition of the death penalty, international law prohibits states which have abolished the death penalty (such as Australia) from exposing a person to the death penalty in another state. This includes prohibiting the provision of information to other countries that may use that information to investigate and convict someone of an offence to which the death penalty applies.[95] Additionally, it is not clear if sharing information with the authorities of certain foreign countries could risk exposing a person to torture or cruel, inhuman or degrading treatment or punishment. Australia has an obligation not to subject any person to torture or to cruel, inhuman or degrading treatment or punishment.[96] Under international law the prohibition on torture is absolute and can never be subject to permissible limitations.[97]

1.59 The statement of compatibility does not acknowledge that the measure may engage and limit the right to life or have implications for the prohibition against torture or cruel, inhuman or degrading treatment or punishment, and so does not provide an assessment of whether the measure is compatible with these rights. In assessing whether the measure is compatible with these rights, the scope of personal information that may be disclosed is relevant as well as whether there are safeguards in place to ensure that information is not shared with the authority of a foreign country in circumstances that could expose a person to the death penalty or to torture or cruel, inhuman or degrading treatment or punishment.

1.60 In order to assess the compatibility of this measure with human rights, further information is required as to:

(a) what is the nature and scope of personal information that is authorised to be disclosed to the authority of a foreign country;

(b) what conditions is it expected the Commissioner will impose on the disclosure of information with the authority of a foreign country and what are the consequences, if any, of that authority failing to comply

95 Second Optional Protocol to the International Covenant on Civil and Political Rights. In 2009, the United Nations Human Rights Committee stated its concern that Australia lacks 'a comprehensive prohibition on the providing of international police assistance for the investigation of crimes that may lead to the imposition of the death penalty in another state', and concluded that Australia should take steps to ensure it 'does not provide assistance in the investigation of crimes that may result in the imposition of the death penalty in another State': UN Human Rights Committee, *Concluding observations on the fifth periodic report of Australia*, CCPR/C/AUS/CO/5 (2009) [20].

96 International Covenant on Civil and Political Rights, article 7; and Convention against Torture and other Cruel, Inhuman, Degrading Treatment or Punishment, articles 3–5. See also the prohibitions against torture under Australian domestic law, for example the *Criminal Code Act 1995*, Schedule 1, Division 274.

97 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, article 4(2); UN Human Rights Committee, *General Comment 20: Article 7* (1992) [3].

with those conditions, particularly where an individual's right to privacy is not protected;

(c) why there is no requirement in the bill requiring that the Commissioner, when disclosing information to a foreign country, must impose conditions in relation to privacy protections around the handling of personal information, and protection of personal information from unauthorised disclosure;

(d) what is the level of risk that the disclosure of personal information could result in: the investigation and conviction of a person for an offence to which the death penalty applies in a foreign country; and/or a person being exposed to torture or cruel, inhuman or degrading treatment or punishment in a foreign country; and

(e) what, if any, safeguards are in place to ensure that information is not shared with the authority of a foreign country in circumstances that could expose a person to the death penalty or to torture or cruel, inhuman or degrading treatment or punishment, including:

(i) the approval process for authorising disclosure;

(ii) the availability of any guidelines as to when disclosure would not be appropriate in certain cases and to certain countries; and

(iii) whether there will be a requirement to decline to disclose information where there is a risk that it may expose a person to the death penalty or to torture or cruel, inhuman or degrading treatment or punishment.

## Committee view

**1.61 The committee notes that the bill provides that any information obtained by the Commissioner using the powers under the bill can be disclosed to a number of listed authorities, including certain authorities of a foreign country where the Commissioner is satisfied that the information will enable or assist the foreign authority to perform or exercise certain regulatory or enforcement functions or powers.**

**1.62 The committee notes that authorising the disclosure of this information, which may include personal information, to the authorities of foreign countries engages and limits the right to privacy. The right to privacy may be subject to permissible limitations if they are shown to be reasonable, necessary and proportionate. The committee considers that enhancing the ability of foreign authorities to protect the interests of children and victims of cyber-abuse constitutes a legitimate objective, and authorising the sharing of information obtained by the Commissioner may be effective to achieve that important objective. However, the committee notes that some questions remain as to whether the measure is proportionate to achieving that objective.**

**1.63 The committee also notes that to the extent that the measure would authorise the disclosure of personal information to foreign authorities responsible for enforcing laws of the foreign country, where this may be used to investigate and convict a person of an offence to which the death penalty applies, the right to life may be engaged and limited. It is also not clear if sharing information with the authorities of certain foreign countries could risk exposing a person to torture or cruel, inhuman or degrading treatment or punishment.**

**1.64 The committee has not yet formed a concluded view in relation to this matter. It considers further information is required to assess the human rights implications of this measure, and as such seeks the minister's advice as to the matters set out at paragraph [1.60].**

## Substantial civil penalties

1.65 In setting out a regulatory framework for online safety, the bill creates several civil penalty provisions for a failure to comply with the Commissioner's orders. Many of these civil penalties are directed to social media and internet search providers, but others would apply to individual members of the public. For example, a person who posted an intimate image of a person without their consent, or refused to comply with a removal notice to remove that image, would be liable to up to 500 penalty units (or $111,000).[98] Similarly, a person who posts cyber-abuse material targeted at an Australian adult who does not comply with a removal notice would be liable to up to 500 penalty units.[99] In addition, a person who refuses or fails to answer a question, give evidence or produce documents when required may be subject to up to 100 penalty units (or $22,200).

## Preliminary international human rights legal advice

### *Criminal process rights*

1.66 By introducing civil penalties for breaches of certain provisions, this measure may engage criminal process rights. This is because certain civil penalties may, depending on the context, be regarded as criminal for the purposes of international human rights law.

1.67 In assessing whether a civil penalty may be considered criminal, it is necessary to consider:

- the domestic classification of the penalty as civil or criminal (although the classification of a penalty as 'civil' is not determinative as the term 'criminal' has an autonomous meaning in human rights law);

98 See Part 6, clauses 75, 79 and 80. The current penalty unit is $222, see *Crimes Act 1914*, section 4AA.

99 See Part 7, clauses 89 and 91.

- the nature and purpose of the penalty: a civil penalty is more likely to be considered 'criminal' in nature if it applies to the public in general rather than a specific regulatory or disciplinary context, and where there is an intention to punish or deter, irrespective of the severity of the penalty; and
- the severity of the penalty.

1.68 The statement of compatibility notes that the civil penalties are not classified as criminal and do not impose criminal liability, nor do they carry the possibility of imprisonment. The statement of compatibility states that the purpose of the civil penalties is to encourage compliance with a removal notice or remedial direction given to the person. It states that the amount of 500 penalty units reflects the significant harm and distress that can be caused to a person for failing to remove material subject to the removal notice. It also notes that the court, when considering the amount of the penalty to be imposed, has a discretion to not impose the full 500 penalty units in relation to a contravention.[100]

1.69 However, while the court retains a discretion as to the amount of the penalty to impose, the legislation itself would allow the imposition of a penalty of up to 500 penalty units. Noting that the provisions could apply to the public at large, and do not apply in a specific regulatory or disciplinary context, a penalty of up to $111,000 is significant. It is noted that under international human rights law, even if a penalty is not considered 'criminal' separately under steps two or three, it may still be considered 'criminal' where the nature and severity of the penalty are cumulatively considered.

1.70 If the civil penalty provisions were considered to be 'criminal' for the purposes of international human rights law, this does not mean that the relevant conduct must be turned into a criminal offence in domestic law nor does it mean that the civil penalty is illegitimate. Instead, it means that the civil penalty provisions in question must be shown to be consistent with the criminal process guarantees set out in article 14 of the International Covenant on Civil and Political Rights, including the right not to be tried twice for the same offence,[101] and the right to be presumed innocent until proven guilty according to law.[102] In this regard, as the statement of compatibility does not recognise that the penalties may be regarded as 'criminal' for the purposes of international human rights law, it provides no information as to whether the penalties would, in all instances, be consistent with these criminal process guarantees.

100 Statement of compatibility, p. 62.

101 International Covenant on Civil and Political Rights, article 14(7).

102 International Covenant on Civil and Political Rights, article 14(2).

## Committee view

**1.71 The committee notes that the bill seeks to introduce civil penalties for a failure to comply with the Commissioner's orders. While many of the civil penalties are directed to social media and internet search providers, others would apply to individual members of the public and would be up to 500 civil penalty units (or up to $111,000).**

**1.72 The committee notes that depending on the context in which they appear, civil penalty provisions can engage criminal process rights if they are considered 'criminal' in nature for the purposes of international human rights law. Significant considerations are whether the penalties apply to the public in general and the severity of the penalty.**

**1.73 In this case, noting that the penalties apply to the public at large, and a $111,000 penalty may be significant to many individuals, there is a risk that these penalties may be considered to be 'criminal' penalties under international human rights law. This does not mean that the relevant conduct must be turned into a criminal offence in domestic law nor does it mean that the civil penalty is illegitimate. Instead, it means that the civil penalty provisions in question must be shown to be consistent with criminal process rights, including the right not to be tried twice for the same offence, and the right to be presumed innocent until proven guilty according to law. It is not clear whether these civil penalty provisions would meet these standards.**

**1.74 The committee draws these human rights concerns to the attention of the minister and the Parliament.**

# Social Services Legislation Amendment (Strengthening Income Support) Bill 2021[1]

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|---|---|
| **Purpose** | This bill seeks to amend the *Social Security Act 1991* to:<br>• increase the maximum basic rates of working age social security payments by $50 per fortnight;<br>• extend until 30 June 2021 the criteria for a person to qualify for youth allowance (other) or jobseeker payment in circumstances where the person is in quarantine or self-isolation or caring for a family member or household member in quarantine or self-isolation due to COVID-19;<br>• extend until 30 June 2021 the waiver of the ordinary waiting period for jobseeker payment and youth allowance (other);<br>• extend until 30 June 2021 the portability period for certain age pensioners and recipients of the disability support pension (for severely disabled persons) unable to return to, or depart from, Australia within 26 weeks due to the impact of COVID-19; and<br>• permanently increase the ordinary income-free area for jobseeker payment, youth allowance (other), parenting payment partnered and related payments to $150 per fortnight |
| **Portfolio** | Social Services |
| **Introduced** | House of Representatives, 25 February 2021 |
| **Rights** | Social security; adequate standard of living |

## Maximum basic rates of working age social security payments

1.75 This bill seeks to increase the maximum basic rates of working age social security payments by $50 per fortnight from 1 April 2021, when the current COVID-

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Social Services Legislation Amendment (Strengthening Income Support) Bill 2021, *Report 3 of 2021*; [2021] AUPJCHR 29.

19 social security supplement ceases.[2] The proposed increase would apply to recipients of the jobseeker payment, youth allowance, youth disability support pension, parenting payment, austudy, partner allowance and widow allowance.[3] The bill also proposes to extend from 1 April 2021 to 30 June 2021 the temporary COVID-19 altered provisions relating to youth allowance and jobseeker qualification (where the person is in quarantine or self-isolation or caring for a family or household member in quarantine or self-isolation due to COVID-19); waivers of the ordinary waiting period; and the discretion to extend the portability period (where specified recipients have travelled overseas and are unable to return to Australia because of the COVID-19 pandemic).[4] Additionally, the bill seeks to permanently increase the ordinary
income-free area for jobseeker, youth allowance (other) and parenting payments as well as provide that the jobseeker income free area will no longer be indexed.[5]

## Preliminary international human rights legal advice

*Rights to social security and adequate standard of living*

1.76 By increasing the maximum basic rate of working age social security payments by $50 per fortnight on an ongoing basis, and extending the temporary COVID-19 altered provisions to 30 June 2021, these measures, taken alone, engage and promote the right to social security and the right to an adequate standard of living. The right to social security recognises the importance of adequate social benefits in reducing the effects of poverty and plays an important role in realising many other economic, social and cultural rights, in particular the right to an adequate standard of living.[6] The right to an adequate standard of living requires Australia to take steps to ensure the availability, adequacy and accessibility of food,

2 Schedule 1, items 1–10; explanatory memorandum, p. 2. The COVID-19 supplement was originally introduced at a rate of $550 per fortnight from 27 April to 24 September 2020. The supplement was subsequently extended for a further three months at $250 per fortnight, expiring on 31 December 2020. The current COVID-19 supplement, paid at a rate of $150 per fortnight, is in effect from 1 January to 31 March 2021. See *Coronavirus Economic Response Package Omnibus Act 2020*; Social Security (Coronavirus Economic Response—2020 Measures No. 14) Determination 2020; Social Security (Coronavirus Economic Response—2020 Measures No. 16) Determination 2020.

3 The Explanatory memorandum, p. 2, states that recipients of partner allowance and widow allowance will also receive the same increases to their rate of jobseeker before these payments cease on 1 January 2022. Equivalent changes will also be made to ABSTUDY living allowance.

4 Schedule 1, items 13–20, 34–39

5 Schedule 1, items 21–32.

6 International Covenant on Economic, Social and Cultural Rights, article 9. See also, UN Economic, Social and Cultural Rights Committee, *General Comment No. 19: The Right to Social Security* (2008).

clothing, water and housing for all people in Australia, and also imposes on Australia the obligations listed above in relation to the right to social security.[7] The statement of compatibility identifies this, and notes that the increased payments have a flow-on effect to the children of recipients by increasing financial support for families, thereby also promoting the rights of the child.[8]

1.77 As a party to the International Covenant on Economic, Social and Cultural Rights, Australia has an obligation to take steps towards achieving the progressive realisation of economic, social and cultural rights. It also has a corresponding duty to refrain from taking unjustified retrogressive measures, or backwards steps with respect to their realisation.[9] As a matter of law, this bill provides for a $50 fortnightly increase to the maximum basic rate of working age social security payments. This increase would take effect from 1 April 2021, when the current COVID-19 supplement, paid at a rate of $150 per fortnight, ceases.[10] As such, the permanent increase to the basic rate may be seen to be a new measure that helps to progressively realise the rights to social security and an adequate standard of living. However, the recipients to whom this $50 fortnightly increase would apply will, in practice, receive $100 less per fortnight than they previously received with the COVID-19 supplement. This raises questions as to whether this may constitute a backwards step in the realisation of the rights to social security and an adequate standard of living as a matter of international human rights law.

1.78 The United Nations (UN) High Commissioner for Human Rights has noted that a retrogressive measure may be one that indirectly 'leads to backward movement in the enjoyment of the rights recognized in the Covenant'.[11] Accordingly, in assessing whether a measure may be retrogressive, it is relevant to consider the context in which the relevant law is being implemented, the impact it will have on individuals, and the effect it will have on their human rights overall. In this case, while the increase to the maximum basic rate of working age social security payments is, taken alone, a rights-enhancing measure, considering the effect of this measure in context, notably its commencement when the temporary COVID-19

7 International Covenant on Economic, Social and Cultural Rights, article 11.

8 Statement of compatibility, pp. 13–14.

9 International Covenant on Economic, Social and Cultural Rights, article 2. UN Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The nature of States parties obligations (Art. 2, par. 1)* (1990) [9].

10 Explanatory memorandum, p. 2. The Social Security (Coronavirus Economic Response—2020 Measures No. 16) Determination 2020 provided for the payment of the COVID-19 supplement at a rate of $150 per fortnight from 1 January 2021 to 31 March 2021. The Parliamentary Joint Committee on Human Rights previously commented on this instrument in *Report 2 of 2021*, pp. 54–57.

11 See, UN High Commissioner for Human Rights, *Report on austerity measures and economic and social rights*, E/2013/82 (7 May 2013), p. 11.

supplement ceases, there is a risk that this measure may be retrogressive in relation to the realisation of the rights to social security and an adequate standard of living. This is because in the context of the removal of the COVID-19 supplement – albeit noting that the supplement was always intended to be temporary – the practical effect of the measure will be an overall reduction of $100 per fortnight in the rate of social security payments received by relevant recipients. If this were to be considered retrogressive, it may be permissible under international human rights law providing that it addresses a legitimate objective, is rationally connected to that objective and is a proportionate way to achieve that objective.

1.79 The UN Committee on Economic, Social and Cultural Rights has advised that if any deliberately retrogressive measures are taken with respect to a right, the State party has the burden of proving that they have been introduced 'after the most careful consideration of all alternatives' and that 'they are duly justifiable by reference to the totality of the rights provided for in the Covenant, in the context of the full use of the maximum available resources of the State party'.[12] It is not entirely clear whether the increase to the working age social security payments in the context of the removal of the COVID-19 supplement would constitute a retrogressive measure as a matter of international human rights law. However, noting that there is a risk that it might, it would be necessary to consider whether the burden of proof referred to by the UN Committee on Economic, Social and Cultural Rights has been met. In light of this, it is difficult to assess the compatibility of this measure, because the statement of compatibility does not address whether the measure was introduced after consideration of all alternatives, nor does it consider the practical impact of the measure on the rights of social security recipients, particularly whether

12 UN Committee on Economic, Social and Cultural Rights, *General Comment 19: the right to social security* (2008) [42]: 'There is a strong presumption that retrogressive measures taken in relation to the right to social security are prohibited under the Covenant. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant, in the context of the full use of the maximum available resources of the State party. The Committee will look carefully at whether: (a) there was reasonable justification for the action; (b) alternatives were comprehensively examined; (c) there was genuine participation of affected groups in examining the proposed measures and alternatives; (d) the measures were directly or indirectly discriminatory; (e) the measures will have a sustained impact on the realization of the right to social security, an unreasonable impact on acquired social security rights or whether an individual or group is deprived of access to the minimum essential level of social security; and (f) whether there was an independent review of the measures at the national level'.

the proposed maximum basic rate is adequate, in all circumstances, to meet the basic costs of living for recipients and their dependents.[13]

## Committee view

**1.80 The committee notes that this bill seeks to increase the maximum basic rates of working age social security payments by $50 per fortnight as well as extend from 1 April 2021 to 30 June 2021 the temporary COVID-19 altered provisions relating to youth allowance and jobseeker qualifications; ordinary waiting periods; and the portability period. The committee notes that this increase in social security payments will take effect on 1 April 2021, when the current COVID-19 supplement ceases. The committee considers that the $50 fortnightly increase to the working age payments, which is designed to provide financial assistance to vulnerable groups, taken alone, promotes the rights to social security and an adequate standard of living.**

**1.81 The committee notes the advice that although the increase is, taken alone, a rights-enhancing measure, considering the effect of this measure in context, notably its commencement when the temporary COVID-19 supplement ceases, there is some risk that this measure in context may constitute a retrogressive measure (that is, a backwards step) in relation to the realisation of the rights to social security and an adequate standard of living. Retrogressive measures, a type of limitation, may be permissible under international human rights law if they are shown to be reasonable, necessary and proportionate. If this were found to constitute a retrogressive measure, the statement of compatibility would need to provide an analysis as to whether this measure would be permissible under international human rights law.**

**1.82 Noting that it is not entirely clear whether the $50 fortnightly increase to the working age social security payments in the context of the removal of the $150 fortnightly COVID-19 supplement would constitute a retrogressive measure as a matter of international human rights law, the committee makes no concluded view in relation to this but draws the above advice to the attention of the minister and the Parliament.**

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13 The UN Committee on Economic, Social and Cultural Rights has noted that social security benefits must be adequate in amount and duration having regard to the principle of human dignity, so as to avoid any adverse effect on the levels of benefits and the form in which they are provided. It stated that the 'adequacy criteria should be monitored regularly to ensure that beneficiaries are able to afford the goods and services they require to realize their Covenant rights': UN Committee on Economic, Social and Cultural Rights, *General Comment No. 19: The Right to Social Security* (2008) [22]. It is noted that the Parliamentary Joint Committee on Human Rights has previously questioned the adequacy of (what was then) Newstart (now Jobseeker) in meeting the minimum requirements of the right to an adequate standard of living, see *Social Security Legislation Amendment (Fair Incentives to Work) Act 2012 – Final Report* (March 2013), pp. 28–30.

# Bills and instruments with no committee comment[1]

1.83 The committee has no comment in relation to the following bills which were introduced into the Parliament between 22 to 25 February 2021. This is on the basis that the bills do not engage, or only marginally engage, human rights; promote human rights; and/or permissibly limit human rights:[2]

- Australian Local Power Agency Bill 2021;
- Australian Local Power Agency (Consequential Amendment) Bill 2021;
- Ending Indefinite and Arbitrary Immigration Detention Bill 2021;
- Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021;
- Northern Australia Infrastructure Facility Amendment (Extension and Other Measures) Bill 2021;
- Private Health Insurance Legislation Amendment (Age of Dependants) Bill 2021;
- Special Recreational Vessels Amendment Bill 2021; and
- Work Health and Safety Amendment (Norfolk Island) Bill 2021.

1.84 The committee has examined the legislative instruments registered on the Federal Register of Legislation between 28 January and 18 February2021.[3] The committee has determined not to comment on the instruments from this period on the basis that the instruments do not engage, or only marginally engage, human rights; promote human rights; and/or permissibly limit human rights.

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1 This section can be cited as Parliamentary Joint Committee on Human Rights, Bills and instruments with no committee comment, *Report 3 of 2021*; [2021] AUPJCHR 30.

2 Inclusion in the list is based on an assessment of the bill and relevant information provided in the statement of compatibility accompanying the bill. The committee may have determined not to comment on a bill notwithstanding that the statement of compatibility accompanying the bill may be inadequate.

3 The committee examines all legislative instruments registered in the relevant period, as listed on the Federal Register of Legislation. To identify all of the legislative instruments scrutinised by the committee during this period, select 'legislative instruments' as the relevant type of legislation, select the event as 'assent/making', and input the relevant registration date range in the Federal Register of Legislation's advanced search function, available at: https://www.legislation.gov.au/AdvancedSearch.