



# Parliamentary Joint Committee on Human Rights

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Human rights scrutiny report

Report 11 of 2024

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PO Box 6100  
Parliament House  
Canberra ACT 2600

Phone: 02 6277 3823

Email: [human.rights@aph.gov.au](mailto:human.rights@aph.gov.au)

Website: [http://www.aph.gov.au/joint\\_humanrights/](http://www.aph.gov.au/joint_humanrights/)

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## Membership of the committee

### Members

Mr Josh Burns MP, Chair	Macnamara, Victoria, ALP
Mr Henry Pike MP, Deputy Chair	Bowman, Queensland, LNP
Ms Jodie Belyea MP	Dunkley, Victoria, ALP
Senator Ross Cadell	New South Wales, NATS
Senator Lisa Darmanin	Victoria, ALP
Senator Matt O'Sullivan	Western Australia, LP
Ms Alicia Payne MP	Canberra, Australian Capital Territory, ALP
Mr Graham Perrett MP	Moreton, Queensland, ALP
Senator David Shoebridge	New South Wales, AG
Senator Jana Stewart	Victoria, ALP
Senator Lidia Thorpe	Victoria, IND
Ms Kylea Tink MP	North Sydney, New South Wales, IND

### Secretariat

Charlotte Fletcher, Committee Secretary  
Rebecca Preston, Principal Research Officer  
Stephanie Lum, Principal Research Officer  
Claire Gay, Senior Research Officer  
Rashmi Chary, Legislative Research Officer

### Committee legal adviser

Associate Professor Jacqueline Mowbray



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## Committee information

Under the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Act), the committee's functions are to examine bills, Acts and legislative instruments for compatibility with human rights, and report to both Houses of the Parliament. The committee may also inquire into and report on any human rights matters referred to it by the Attorney-General.

The committee assesses legislation for compatibility with the human rights set out in seven international treaties to which Australia is a party.<sup>1</sup> The committee's *Guide to Human Rights* provides a short and accessible overview of the key rights contained in these treaties which the committee commonly applies when assessing legislation.<sup>2</sup>

The establishment of the committee builds on Parliament's tradition of legislative scrutiny. The committee's scrutiny of legislation seeks to enhance understanding of, and respect for, human rights in Australia and ensure attention is given to human rights issues in legislative and policy development.

Some human rights obligations are absolute under international law. However, most rights may be limited as long as it meets certain standards. Accordingly, a focus of the committee's reports is to determine whether any limitation on rights is permissible. In general, any measure that limits a human right must comply with the following limitation criteria: be prescribed by law; be in pursuit of a legitimate objective; be rationally connected to (that is, effective to achieve) its stated objective; and be a proportionate way of achieving that objective.

Chapter 1 of the reports include new and continuing matters. Where the committee considers it requires further information to complete its human rights assessment it will seek a response from the relevant minister, or otherwise draw any human rights concerns to the attention of the relevant minister and the Parliament. Chapter 2 of the committee's reports examine responses received in relation to the committee's requests for information, on the basis of which the committee has concluded its examination of the legislation.

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<sup>1</sup> International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of Discrimination against Women; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child; and Convention on the Rights of Persons with Disabilities.

<sup>2</sup> See the committee's [Guide to Human Rights](#). See also the committee's guidance notes, in particular [Guidance Note 1 – Drafting Statements of Compatibility](#).

## Report snapshot<sup>1</sup>

In this report the committee has examined the following bills and legislative instruments for compatibility with human rights. The committee's full consideration of legislation commented on in the report is set out in Chapters 1 and 2.

### Bills

#### Chapter 1: New and continuing matters

Bills introduced 18 November to 22 November 2024	19
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#### Abolition of Special Prospecting Authorities (Ocean Protection) Bill 2024

No comment

#### Aged Care (Consequential and Transitional Provisions) Bill 2024

The committee has deferred consideration of this bill.

#### Anti-Money Laundering and Counter-Terrorism Financing Amendment (Making Gambling Businesses Accountable) Bill 2024

The committee notes that this non-government bill appears to engage and may limit human rights. Should this bill proceed to further stages of debate, the committee may request further information from the legislation proponent as to the human rights compatibility of the bill.

<sup>1</sup> This section can be cited as Parliamentary Joint Committee on Human Rights, Report snapshot, *Report 11 of 2024*; [2024] AUPJCHR 84.

<sup>2</sup> The committee makes no comment on the remaining bills on the basis that they do not engage, or only marginally engage, human rights; promote human rights; and/permissibly limit human rights. This 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.

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### Broadcasting Services Amendment (Healthy Kids Advertising) Bill 2024

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No comment

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### Competition and Consumer Amendment (Australian Energy Regulator Separation) Bill 2024

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No comment

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### Electoral Legislation Amendment (Electoral Communications) Bill 2024

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*Seeking Information*

#### **Regulating the authorisation of certain electoral or referendum matters**

*Rights to freedom of expression; take part in public affairs; privacy*

This bill would amend the *Commonwealth Electoral Act 1918* and the *Referendum (Machinery Provisions) Act 1984* to prohibit the authorisation of certain electoral matters (or referendum matters), where they include content which is 'inaccurate and misleading to a material extent' during electoral and referendum periods. The committee notes that regulating the publication of electoral and referendum matters which include content which is inaccurate or misleading to a material extent may promote the right to participate in public affairs, and the right to privacy and reputation. However, the committee notes that restricting what people can communicate regarding elections and referendums engages and limits the right to freedom of expression, and that the publication of decisions by the panel (that a person has authorised an electoral advertisement or referendum material containing inaccurate and misleading information) may engage and limit the right to privacy. The committee is seeking further information from the minister in order to assess the human rights compatibility of this measure.

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### Electoral Legislation Amendment (Electoral Reform) Bill 2024

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*Seeking Information*

#### **Gift caps, electoral expenditure caps and increases to public funding of parties and candidates**

*Right to take part in public affairs; freedom of expression; right to equality and non-discrimination*

The bill seeks to amend the *Commonwealth Electoral Act 1918* to cap the provision of electoral financing gifts and permissible electoral expenditure, and seeks to increase public funding to incumbent parties and candidates. The committee notes that the stated intention of the measure is to limit the influence of big donors and allow for more individuals and entities to participate in political debate. The committee considers that, to the extent the measure may achieve this in practice, it may promote the right to take part in public affairs and the right to freedom of expression,

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however the measures may also limit the rights to take part in public affairs, the right to freedom of expression and the right to equality and non-discrimination. The committee is seeking further information from the minister in order to assess the human rights compatibility of this measure.

#### **Reducing the donations disclosure threshold**

*Rights to privacy; take part in public affairs*

The bill would reduce the threshold for which disclosure of an electoral donation must be made public from \$16,900 to \$1,000. The committee considers that to the extent that this would provide greater transparency over political donations, this may promote the right to take part in public affairs. However, the committee considers that the requirement to publicly disclose a greater number of donations, a process which includes the publication of personal information on the Australian Electoral Commission's Transparency Register, also engages and limits the right to privacy and, if this measure resulted in individuals choosing not to donate to political candidates because they do not want their information to be public, may limit the right to take part in public affairs. The committee is seeking further information from the minister in order to assess the human rights compatibility of this measure.

#### **Ability to vote in cases of cognitive impairment**

*Rights of persons with disability to equal recognition before the law; take part in public affairs*

The bill would substitute the words in two provisions of the *Commonwealth Electoral Act 1918* from 'being of unsound mind' to 'cognitive impairment'. The effect of this is to retain provisions which restrict the circumstances in which an individual is entitled to be enrolled and vote based on cognitive impairment. The committee considers that this measure engages and limits the rights of persons with disabilities to equal recognition before the law and the right to take part in public affairs, which the statement of compatibility does not identify. The committee is seeking further information from the minister in order to assess the human rights compatibility of this measure.

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### **Electoral Legislation Amendment (Fair Territory Representation) Bill 2024**

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No comment

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### **Health Insurance (Pathology) (Fees) (Repeal) Bill 2024**

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No comment

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### Health Legislation Amendment (Modernising My Health Record—Sharing by Default) Bill 2024

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The committee has deferred consideration of this bill.

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### Housing Legislation Amendment (Fair Share for Regional Housing) Bill 2024

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No comment

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### Lobbying (Improving Government Honesty and Trust) Bill 2024

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The committee notes that this non-government bill appears to engage and may limit human rights. Should this bill proceed to further stages of debate, the committee may request further information from the legislation proponent as to the human rights compatibility of the bill.

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### Midwife Professional Indemnity (Commonwealth Contribution) Scheme Amendment Bill 2024

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No comment

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### Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2024

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*Advice to Parliament*

#### **Prohibiting items in immigration detention**

*Right to freedom of expression; privacy; protection of the family; and security of person*

The bill seeks to amend the *Migration Act 1958* to prohibit the possession of certain items by people in immigration detention facilities and detainees (whether or not they are in an immigration detention facility) and would empower the minister to determine that detainees are prohibited from having access to certain things, such as mobile phones and internet enabled devices, in an immigration detention environment. The committee previously considered a substantially similar bill in 2020, including seeking further information from the relevant minister. The committee notes that the measure is designed to ensure safety, security and order in immigration detention facilities, and considers that if the measure is able to achieve this objective it could promote the right to security of the person. However, the committee notes that this also engages and limits a number of other human rights, including the right to privacy, the right to protection of the family, and the right to freedom of expression. The committee considers that the broad scope of the proposed power to declare items as 'prohibited things' (including mobile phones) means there is a risk that the powers could be exercised in a manner which is not compatible with the rights to privacy and freedom of expression and the right of detainees not to be subjected to arbitrary or unlawful interference with family. The committee considers the proportionality of this measure may be assisted were the bill amended to require that where a detainee (whether in a detention centre or otherwise) who has had a mobile

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phone or internet device seized, the department must ensure that they have access to digital communication facilities that will reasonably meet their needs, and enable timely and, where appropriate, private contact with friends, family and legal services. The committee recommends that the statement of compatibility be updated.

### **Search and seizure powers**

#### *Multiple rights*

The bill would allow for searches, without a warrant, for a 'prohibited thing', as well as searches for a weapon or other thing capable of being used to inflict bodily injury or to help a detainee escape. This would include the ability to search a person, the person's clothing and any property under the immediate control of the person for a weapon or escape aid or 'prohibited thing' (even if the officer has no suspicion the detainee has such an item), the ability to take and retain possession of such items if found pursuant to a search, and the ability to conduct strip searches to search for such items. The committee considers that providing authorised officers with the power to conduct strip searches or to use force to search for items may engage the absolute prohibition against torture, cruel, inhuman and degrading treatment or punishment, and the right to humane treatment of persons in detention. The committee further considers that, given the obligation under international human rights law regarding the investigation and compensation for complaints of mistreatment in detention, there may not be adequate protection of the right to an effective remedy for violations of human rights arising from these measures.

The committee considers that the screening of detainees, conducting strip searches of detainees, and searches of immigration detention facilities also engage and limit the right to privacy, and may engage and limit the rights of the child. In this regard, the committee notes that while only a small number of children are currently detained in an immigration detention facility, the detention of children in such facilities is not prevented as a matter of law. The committee considers that while the *Migration Act 1958* contains a number of safeguards, concerns remain that a number of the circumstances that limit the exercise of power (such as the requirement that strip searches be a measure of last resort), may only be addressed as matters of departmental policy rather than as a safeguard in the legislation. The committee has made some recommendations that may assist with the human rights compatibility of the measure and recommends that the statement of compatibility be updated.

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## National Organic Standard Bill 2024

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The committee notes that this non-government bill appears to engage and may limit human rights. Should this bill proceed to further stages of debate, the committee may request further information from the legislation proponent as to the human rights compatibility of the bill.

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## Online Safety Amendment (Social Media Minimum Age) Bill 2024

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### *Advice to Parliament*

### **Banning children aged under 16 from certain online platforms**

*Rights of the child; health; privacy; freedom of expression; equality and non-discrimination*

The bill seeks to amend the *Online Safety Act 2021* to require that providers of 'age-restricted social media platforms' must take 'reasonable steps to prevent' children aged under 16 years from having accounts with such a platform. The committee considers that this measure is directed towards the important objective of protecting children from exposure to harms online. The committee considers that to the extent that this measure may be effective to achieve that, it would likely promote several human rights relating to children.

However, the committee notes that by restricting the content and platforms to which children aged under 16 may have access (and in which they may form and join groups), this measure would limit the rights of the child including the rights to freedom of expression, freedom of assembly, equality and non-discrimination, and privacy. In addition, by requiring providers to determine the age of *all* services users, a process which would require the provision of personal information in order to prove a person's age, this measure would engage and limit the rights to privacy, freedom of expression, and equality and non-discrimination with respect to all persons (regardless of their age). The committee considers that while the bill is directed towards a legitimate objective, and may be capable of achieving it, it is not clear that the measures would constitute a proportionate limit on these rights, in that the measure does not appear to be sufficiently circumscribed, there appear to be minimal safeguards in the bill with respect to the right to privacy, and it is not clear that this measure would be subject to sufficient oversight and review. The committee further considers that if this measure did result in an impermissible limit on a person's human rights (including the right to privacy or freedom of expression), it is not clear that the person would have access to an effective remedy. The committee has made recommendations to amend the bill and has proposed that the statement of compatibility be updated.

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## Requiring Energy Infrastructure Providers to Obtain Rehabilitation Bonds Bill 2024

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No comment

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**Surveillance Legislation (Confirmation of Application) Bill 2024**

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The committee has deferred consideration of this bill.

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**Workplace Gender Equality Amendment (Setting Gender Equality Targets) Bill 2024**

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No comment

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## Legislative instruments

### Chapter 1: New and continuing matters

Legislative instruments registered on the [Federal Register of Legislation](#) between 11 October to 21 October 2024<sup>3</sup> 56

Legislative instruments commented on in report<sup>4</sup> 0

### Chapter 2: Concluded

Legislative instruments committee has concluded its examination of following receipt of ministerial response 0

### Instrument imposing sanctions on individuals<sup>5</sup>

One legislative instrument imposes sanctions on individuals. The committee has considered the human rights compatibility of similar instruments on a number of occasions, and retains scrutiny concerns about the compatibility of the sanctions regime with human rights.<sup>6</sup> However, as this legislative instrument does not appear to designate or declare any individuals who are currently within Australia's jurisdiction, the committee makes no comment in relation to this instrument at this stage.

<sup>3</sup> 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, use the advanced search function on the [Federal Register of Legislation](#), and select 'Collections' to be 'legislative instruments'; 'type' to be 'as made'; and date to be 'registered' and 'between' the date range listed above.

<sup>4</sup> Unless otherwise indicated, the committee makes no comment on the remaining legislative instruments on the basis that they do not engage, or only marginally engage, human rights; promote human rights; and/permissibly limit human rights. This is based on an assessment of the instrument and relevant information provided in the statement of compatibility (where applicable). The committee may have determined not to comment on an instrument notwithstanding that the statement of compatibility accompanying the instrument may be inadequate.

<sup>5</sup> See Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Iran) Amendment (No. 3) Instrument 2024 [F2024L01307].

<sup>6</sup> See, most recently, Parliamentary Joint Committee on Human Rights; [Report 2 of 2024](#) (20 March 2024) pp. 14–20 and [Report 15 of 2021](#) (8 December 2021), pp. 2–11.

## Chapter 1

### New and ongoing matters

1.1 The committee comments on the following bills, and in some instances, seeks a response or further information from the relevant minister.

#### Bills

### Electoral Legislation Amendment (Electoral Communications) Bill 2024<sup>1</sup>

<b>Purpose</b>	<p>The bill seeks to amend the <i>Commonwealth Electoral Act 1918</i> and the <i>Referendum (Machinery Provisions) Act 1984</i> to prohibit the authorisation of certain electoral or referendum matters containing false or misleading material. The bill would establish an Electoral Communications Panel to investigate alleged contraventions and require electoral and referendum matters that have been substantially or entirely created or modified using digital technology (including artificial intelligence) to carry a statement to that effect</p> <p>The bill seeks to make other amendments to repeal (from 1 July 2026) the requirements for licensed broadcasters and the Special Broadcasting Service to not broadcast election or referendum advertising in the last three days of voting in an election or referendum</p>
<b>Portfolio</b>	Finance
<b>Introduced</b>	House of Representatives, 18 November 2024
<b>Rights</b>	Freedom of expression; right to take part in public affairs; privacy

#### Regulating the authorisation of certain electoral or referendum matters

1.2 This bill seeks to amend the *Commonwealth Electoral Act 1918* (Electoral Act) and the *Referendum (Machinery Provisions) Act 1984* (Referendum Act) to prohibit the authorisation of certain electoral matters (or referendum matters), where they include content which is ‘inaccurate and misleading to a material extent’ during electoral and

<sup>1</sup> This entry can be cited as: Parliamentary Joint Committee on Human Rights, Electoral Legislation Amendment (Electoral Communications) Bill 2024, *Report 11 of 2024*; [2024] AUPJCHR 85.

referendum periods.<sup>2</sup> An ‘electoral matter’ refers to a matter communicated or intended to be communicated for the dominant purpose of influencing the way electors vote in a federal election (including through advertisements, leaflets, pamphlets, flyers, posters or how-to-vote cards).<sup>3</sup> Breach of these requirements would be subject to civil penalties. These penalties would not apply where the communication is paid for by an allowance provided for under the *Parliamentary Business Resources Act 2017*, or where the communication was authorised by a Commonwealth department.<sup>4</sup>

1.3 The bill would establish an Electoral Communications Panel (an independent statutory structure within the Australian Electoral Commission) to investigate alleged contraventions of these requirements.<sup>5</sup> The panel would be able to undertake investigations, publish its decisions, and request that remedial action be undertaken. The panel could apply to the Federal Court of Australia for an injunction in relation to a possible contravention.

### **Preliminary international human rights legal advice**

#### ***Rights to freedom of expression; take part in public affairs; privacy***

1.4 Regulating the publication of materials which include false or misleading information about electoral candidates may promote the right to privacy and reputation and the right to take part in public affairs.

1.5 The right to privacy and reputation prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home.<sup>6</sup> The right to take part in public affairs includes guarantees of the right of Australian citizens to stand for public office, to vote in elections and to have access to positions in public service.<sup>7</sup> Given the importance of free speech and protest to the conduct of public affairs in a free and open democracy, the realisation of the right to take part in public affairs depends on the protection of other key rights, such as freedom of expression,

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<sup>2</sup> Schedule 1, item 27, proposed Part XXB – Electoral Communications (Commonwealth Electoral Act 1918) and Schedule 2, item 23, proposed Part IXA – Referendum communications (Referendum (Machinery Provisions) Act 1984).

<sup>3</sup> Commonwealth Electoral Act 1918, section 4AA. A referendum matter refers to matter whose dominant purpose is to influence the way electors vote at a referendum. See, *Referendum (Machinery Provisions) Act 1984*, section 3AA.

<sup>4</sup> Schedule 1, item 27, proposed subsection 321L(3) (Commonwealth Electoral Act 1918) and Schedule 2, item 23, proposed subsection 112D(3) (Referendum (Machinery Provisions) Act 1984).

<sup>5</sup> Schedule 1, item 27, proposed section 321Q (Commonwealth Electoral Act 1918) and Schedule 2, item 23, proposed section 112H (Referendum (Machinery Provisions) Act 1984).

<sup>6</sup> UN Human Rights Committee, *General Comment No. 16: Article 17* (1988) [3]-[4].

<sup>7</sup> UN Human Rights Council, *General Comment No.25: Article 25, Right to participate in public affairs, voting rights and the right of equal access to public service* (1996).



association and assembly. The right to take part in public affairs is an essential part of democratic government that is accountable to the people. It applies to all levels of government, including local government. It includes the right of every citizen to take part in the conduct of public affairs by exerting influence through public debate and dialogues with representatives either individually or through bodies established to represent citizens.<sup>8</sup> The statement of compatibility identifies that the bill engages these human rights.<sup>9</sup>

1.6 With respect to the promotion of the right to take part in public affairs, it is noted that the prohibition on authorising certain electoral matters (or referendum matters), where they include content which is ‘inaccurate and misleading to a material extent’, during electoral and referendum periods would not apply where the communication is paid for by an allowance provided for under the *Parliamentary Business Resources Act 2017* (which provides for parliamentarians’ remuneration, expenses, allowances and other public resources), or where the communication was authorised by a Commonwealth department. The explanatory materials provide no information as to why authorisable electoral or referendum matters paid for or authorised in this manner would be excluded from these requirements.

1.7 Restricting the things which people can communicate regarding elections and referendums 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.<sup>10</sup> It may be subject to limitations that are necessary to protect the rights or reputations of others, national security, public order, public health or morals. Such limitations must be prescribed by law, be rationally connected to the objective of the measures and be proportionate.<sup>11</sup>

1.8 The statement of compatibility states that the objective of prohibiting electoral and referendum materials that contain false or misleading information is to protect the reputation of others, and to ensure that members of Parliament (and referendum matters) are freely chosen by electors as a genuine and free expression of their will.<sup>12</sup> Ensuring the integrity of election and referendum processes, and protecting candidates from unlawful attacks on their reputation within those contexts, is a legitimate objective. Further, the explanatory memorandum states that false electoral information, and the means to make it, is ‘rapidly becoming a major phenomenon’,

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<sup>8</sup> International Covenant on Civil and Political Rights, article 25. See also UN Human Rights Council, *General Comment No.25: Article 25, Right to participate in public affairs, voting rights and the right of equal access to public service* (1996) [1],[5]–[6].

<sup>9</sup> Statement of compatibility, pp. 5–10.

<sup>10</sup> International Covenant on Civil and Political Rights, article 19(2).

<sup>11</sup> UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [21]–[36].

<sup>12</sup> Statement of compatibility, pp. 5– 10.

and highlights international examples of deep-fakes and other misinformation regarding political candidates.<sup>13</sup> This would suggest that these amendments seek to address a matter of a pressing and substantial concern, and the proposed amendments would appear to be rationally connected to (that is, capable of achieving) the stated objectives. As to proportionality, the statement of compatibility notes that these restrictions would only apply to election materials during relevant elections (or referendum matters) which include statements that are inaccurate and misleading to a material extent. They would not prohibit opinion, satire, news, art, education material, or academic content, any private communications for personal purposes, any matter communicated outside of the federal election or referendum period, or any content unrelated to a federal election or referendum. It states that the decision of the panel as to whether content did breach these requirements would be reviewable, and subject to enforcement only by the Federal Court of Australia. In addition, the statement of compatibility notes that the authoriser of the content will be able to rely on the reasonable mistake of fact defence. There are exceptions where the person could not reasonably be expected to have known that the statement was inaccurate or misleading, and the bill would provide that these measures do not apply to the extent that they would infringe on the implied freedom of political communication. As such, it appears that the proposed measures would likely constitute a proportionate limit on the right to freedom of expression.<sup>14</sup>

1.9 The publication of decisions by the panel (that a person has authorised an electoral advertisement or referendum material containing inaccurate/misleading information) may engage and limit the right to privacy. The statement of compatibility states that providing for the publication of decisions will ensure transparency and provide an authoritative source for those people impacted by misleading and inaccurate statements to clear their reputation. This would likely constitute a legitimate objective and be capable of achieving that objective. The statement of compatibility states that the panel will be required to conduct an ‘investigation’ before reaching a decision, but provides no detail as to what such a process would require and whether the person who has authorised the relevant content would be able to make submissions regarding the content. The bill states that the panel would be required to give that person notice of their decision and publish the decision and the reasons in such a manner as the panel considers appropriate. However, it is not clear what information may be published as part of a ‘decision’, and in particular what personal information the panel could publish. It is unclear why the bill does not particularise the information which the panel may and may not publish. As drafted, there may be a risk that the panel could, as a matter of law, publish a wide range of

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<sup>13</sup> Explanatory memorandum, p. 12.

<sup>14</sup> The committee previously considered an amendment to these provisions in 2017, concluding that they likely constituted a permissible limit on the right to freedom of expression. See, Parliamentary Joint Committee on Human Rights, Electoral and Other Legislation Amendment Bill 2017, [Report 8 of 2017](#) (15 August 2017) pp. 92–97.

personal information as part of publishing its decisions. While the panel would not be required to publish a decision where it has decided not to pursue a potential contravention, it is unclear whether, if the panel's decision was reversed on review, the panel would be required to remove the published notice of decision or take other remedial action.

### **Committee view**

1.10 The committee notes that regulating the publication of electoral and referendum matters which include content which is inaccurate or misleading to a material extent may promote the right to participate in public affairs, and the right to privacy and reputation.

1.11 However, the committee notes that restricting what people can communicate regarding elections and referendums engages and limits the right to freedom of expression, and that the publication of decisions by the panel (that a person has authorised an electoral advertisement or referendum material containing inaccurate and misleading information) may engage and limit the right to privacy.

1.12 The committee considers further information is required to assess the compatibility of this measure with these rights, and as such seeks the minister's advice in relation to:

- (a) why authorisable electoral or referendum matters paid for by an allowance provided for under the *Parliamentary Business Resources Act 2017*, or where the communication was authorised by a Commonwealth department, would not be subject to the proposed restrictions;
- (b) what an 'investigation' process undertaken by the Electoral Communications Panel would entail and whether the person who has authorised the relevant content would be able to make submissions regarding the content as part of that process;
- (c) what information the Electoral Communications Panel may publish as part of a 'decision', and what personal information the panel could publish;
- (d) why the bill does not particularise the personal or identifying information which the panel may and may not publish; and
- (e) whether, if the panel's decision was reversed on review, the panel would be required to remove the published notice of decision or take other remedial action.

## Electoral Legislation Amendment (Electoral Reform) Bill 2024<sup>15</sup>

<b>Purpose</b>	The bill seeks to amend the <i>Commonwealth Electoral Act 1918</i> and the <i>Referendum (Machinery Provisions) Act 1984</i> to: <ul style="list-style-type: none"> <li>• introduce gift caps, require expedited disclosure of gifts, and reduce the disclosure threshold to \$1,000;</li> <li>• introduce electoral expenditure caps;</li> <li>• replace the requirement for election returns with annual returns submitted on a calendar year basis; and</li> <li>• increase public funding of parties and candidates.</li> </ul>
<b>Portfolio</b>	Finance
<b>Introduced</b>	House of Representatives, 18 November 2024
<b>Rights</b>	Right to take part in public affairs; freedom of expression; privacy; equality and non-discrimination; rights of persons with disabilities

### Gift caps, electoral expenditure caps and increases to public funding of parties and candidates

1.13 Schedule 3 of the bill seeks to amend the *Commonwealth Electoral Act 1918* (Electoral Act) to introduce annual caps on the gifts that a person or entity can give to the same recipient in a calendar year<sup>16</sup> to fund election campaigning<sup>17</sup> up to \$20,000.<sup>18</sup> The bill would provide that gifts made to recipients related to a particular state or territory would be subject to the state and territory gift cap of 5 times the annual gift cap.<sup>19</sup> A donor would be able to donate to multiple individuals or entities that are not related to an overall gift cap of 32 times the annual gift cap for the calendar year.<sup>20</sup>

<sup>15</sup> This entry can be cited as: Parliamentary Joint Committee on Human Rights, Electoral Legislation Amendment (Electoral Reform) Bill 2024, *Report 11 of 2024*; [2024] AUPJCHR 86.

<sup>16</sup> 'Gift' means any disposition of property made by a person or entity to another person or entity, being a disposition made without consideration in money or money's worth or with inadequate consideration, and includes the provision of a service for no consideration or inadequate consideration: see Schedule 1, part 1, item 18, proposed new section 287AAB.

<sup>17</sup> That is, for a 'Federal purpose'. This means the purpose of incurring electoral expenditure, or creating or communicating electoral matters: see *Commonwealth Electoral Act 1918*, subsection 287(1).

<sup>18</sup> Schedule 3, item 2, proposed subsection 302BA(1).

<sup>19</sup> Schedule 3, item 5, proposed subsection 302CJ(1).

<sup>20</sup> Schedule 3, item 5, proposed subsection 302CI(1).

These caps would reset if a general election were held in a calendar year.<sup>21</sup> The bill would impose separate caps for by-elections and Senate-only elections of \$20,000.<sup>22</sup>

1.14 Schedule 4 of the bill seeks to introduce annual caps on electoral expenditure incurred by registered political parties, candidates, members of the House of Representatives, Senators, associated entities, significant third parties, nominated entities and third parties. 'Electoral expenditure' means expenditure incurred for the dominant purpose of creating or communicating an electoral matter.<sup>23</sup> The bill would provide for different values and formulas to determine a person or entity's expenditure cap.<sup>24</sup> For example, for a registered political party, the bill would cap such expenditure at a federal level to \$90 million, at the divisional level to \$800,000, and at the state or territory level to \$200,000 multiplied by the number of divisions in the state or territory.<sup>25</sup> For an independent House of Representatives candidate or member, the bill would cap expenditure at \$800,000.<sup>26</sup> For an independent Senate candidate or Senator, the bill would cap expenditure at \$200,000 multiplied by the number of divisions in the state or territory, divided by 6 for a state and 2 for a territory.<sup>27</sup> The bill would also impose separate caps for by-elections and Senate-only elections.<sup>28</sup>

1.15 Schedule 7 of the bill seeks to introduce administrative assistance funding and election funding for registered political parties and independent members of the House of Representatives and independent Senators. The Electoral Act provides that election funding is payable in relation to any candidate who received at least four per cent of the total formal first preference votes cast in the election.<sup>29</sup> This bill proposes to increase the nominal dollar rate of \$2.801 (currently indexed at \$3.346) to \$5 per total first preference vote for eligible recipients,<sup>30</sup> and also provides that regulations may be made to provide for the advance payment of election funding.<sup>31</sup>

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<sup>21</sup> Schedule 3, item 5, proposed sections 302CG and 302CK.

<sup>22</sup> Schedule 3, item 1, proposed section 302B; item 5, proposed sections 302CE and 302CF.

<sup>23</sup> Commonwealth Electoral Act 1918, section 287AB.

<sup>24</sup> Schedule 4, item 2, proposed Division 3AB.

<sup>25</sup> Schedule 4, item 2, proposed section 302ALA and subdivision C.

<sup>26</sup> Schedule 4, item 2, proposed section 302ALA and subdivision D.

<sup>27</sup> Schedule 4, item 2, proposed section 302ALA and subdivision E. For example, the independent Senate cap in New South Wales is \$1,533,333 ( $(\$200,000 \times 46) \div 6$ ) and the independent Senate cap in the ACT is \$300,00 ( $(\$200,000 \times 3) \div 2$ ).

<sup>28</sup> Schedule 4, item 2, proposed sections 302AMD and 302AME.

<sup>29</sup> *Commonwealth Electoral Act 1918*, sections 293, 294 and 295.

<sup>30</sup> Schedule 7, part 2.

<sup>31</sup> Schedule 7, item 11, proposed section 298J.

## Preliminary international human rights legal advice

### ***Right to take part in public affairs, freedom of expression; right to equality and non-discrimination***

1.16 To the extent that limiting the amounts of money that can be donated and spent on electoral matters may remove the influence of substantial donors and allow for more individuals and entities to participate in political debate, these measures may promote the right to take part in public affairs and the right to freedom of expression.

1.17 The right to take part in public affairs includes guarantees of the right of Australian citizens to stand for public office, to vote in elections and to have access to positions in public service.<sup>32</sup> The right to take part in public affairs is an essential part of democratic government that is accountable to the people. It applies to all levels of government, including local government. It includes the right of every citizen to take part in the conduct of public affairs by exerting influence through public debate and dialogues with representatives either individually or through bodies established to represent citizens.<sup>33</sup> The right encompasses equality of access to the public service, which includes all positions in the legislature. It requires states to 'treat all political parties on an equal footing and offer them equal opportunities to pursue their legislative activities'.<sup>34</sup> States should ensure equal conditions for independent candidates to stand for elections and not impose unreasonable requirements on their candidacies.

1.18 Given the importance of free speech and protest to the conduct of public affairs in a free and open democracy, the realisation of the right to take part in public affairs depends on the protection of other key rights, such as freedom of expression, association and assembly. 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.<sup>35</sup> The effective functioning of a democratic society necessarily requires free political communication.

1.19 While these measures may promote the right to take part in public affairs and the right to freedom of expression, if they were also to impact the ability of an individual or entity to campaign effectively by limiting donations and electoral expenditure, they may also limit these same rights. Further, to the extent that these

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<sup>32</sup> UN Human Rights Committee, *General Comment No.25: Article 25, Right to participate in public affairs, voting rights and the right of equal access to public service* (1996).

<sup>33</sup> International Covenant on Civil and Political Rights, article 25. See also UN Human Rights Committee, *General Comment No.25: Article 25, Right to participate in public affairs, voting rights and the right of equal access to public service* (1996) [1],[5]–[6].

<sup>34</sup> UN Human Rights Committee, *Concluding observations on the third period report of Rwanda*, CCPR/C/RWA/CO/3 (2009) [21].

<sup>35</sup> International Covenant on Civil and Political Rights, article 19(2).

measures may disproportionately impact people with particular protected attributes who are underrepresented by major political parties (for example, women or ethnic minority groups), they may also engage and limit the right to equality and non-discrimination.<sup>36</sup> This right provides that everyone is entitled to enjoy their rights without discrimination of any kind and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.<sup>37</sup> The right to equality encompasses both 'direct' discrimination (where measures have a discriminatory intent) and 'indirect' discrimination (where measures have a discriminatory effect on the enjoyment of rights).<sup>38</sup> Indirect discrimination occurs where 'a rule or measure that is neutral at face value or without intent to discriminate' exclusively or disproportionately affects people with a particular protected attribute.<sup>39</sup>

1.20 Additionally, increasing public funding to parties and candidates based on formal first preference votes may increase the relative monetary power of some individuals and entities over others, particularly incumbents and bigger parties, which may impact the ability of independents and non-incumbents to take part in public affairs. This bill has been subject to significant public comment raising concerns in this respect.<sup>40</sup>

1.21 The right to take part in public affairs 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 right to freedom of expression may be subject to limitations that are necessary to protect the

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<sup>36</sup> International Covenant on Civil and Political Rights, articles 2 and 26.

<sup>37</sup> International Covenant on Civil and Political Rights, articles 2 and 26. Article 2(2) of the International Covenant on Economic, Social and Cultural Rights also prohibits discrimination specifically in relation to the human rights contained in the International Covenant on Economic, Social and Cultural Rights.

<sup>38</sup> UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989).

<sup>39</sup> *Althammer v Austria*, UN Human Rights Committee Communication no. 998/01 (2003) [10.2]. The prohibited grounds of discrimination are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation. The prohibited grounds of discrimination are often described as 'personal attributes'. See Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 3<sup>rd</sup> edition, Oxford University Press, Oxford, 2013, [23.39].

<sup>40</sup> See, for example, Emerita Professor Anne Twomey, [Sneaky, excessive and unjustified: why Labor's electoral reforms are vulnerable to constitutional challenge](#), *The Guardian*, 20 November 2024; Professor Joo-Cheong Tham, [Political finance law reforms will reduce big money in politics, but will rich donors be the ultimate winners?](#), *The Conversation*, 19 November 2024.

rights or reputations of others,<sup>41</sup> national security, public order, or public health or morals. Additionally, such limitations must be prescribed by law, be rationally connected to the objective of the measures and be proportionate.<sup>42</sup> Differential treatment (including the differential effect of a measure that is neutral on its face) will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.<sup>43</sup>

1.22 The United Nations Human Rights Committee has stated that ‘reasonable limitations on campaign expenditure may be justified where this is necessary to ensure that the free choice of voters is not undermined, or the democratic process distorted by the disproportionate expenditure on behalf of any candidate or party’.<sup>44</sup> It has also commented on the high cost of seeking election in some countries, which it said ‘adversely affects the right of persons to be candidates in elections’.<sup>45</sup> The UN Office of the High Commissioner for Human Rights has guided that within the confines of their electoral systems, states should ensure equal conditions for independent candidates to stand for elections and not impose unreasonable requirements on their candidacies.<sup>46</sup>

### *Legitimate objective*

1.23 Any limitation on a right must be shown to be aimed at achieving a legitimate objective. A legitimate objective is one that is necessary and addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting the right.

1.24 The statement of compatibility briefly identifies that the bill engages the right to participate in public affairs and the right to freedom of expression but does not identify that it engages the right to equality and non-discrimination. It states that gift caps ‘are intended to promote equal opportunity for all individuals and other entities

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<sup>41</sup> Restrictions on this ground must be constructed with care. For example, while it may be permissible to protect voters from forms of expression that constitute intimidation or coercion, such restrictions must not impede political debate. See UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [28].

<sup>42</sup> UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [21]-[36].

<sup>43</sup> UN Human Rights Committee, *General Comment 18: Non-Discrimination* (1989) [13]; see also *Althammer v Austria*, UN Human Rights Committee Communication No. 998/01 (2003) [10.2].

<sup>44</sup> UN Human Rights Committee, *General Comment No.25: Article 25, Right to participate in public affairs, voting rights and the right of equal access to public service* (1996) [19].

<sup>45</sup> UN Human Rights Committee, *Concluding Observations of the Human Rights Committee: United States of America*, CCPR/C/79/Add.50, A/50/40 (1995).

<sup>46</sup> UN Office of the High Commissioner for Human Rights, *Guidelines for States on the effective implementation of the right to participate in public affairs*, p. 11.



to participate in political debate and prevent Australian elections from being unfairly skewed by organisations or individuals with large amounts of money'.<sup>47</sup> In relation to the electoral expenditure caps, it states these 'are necessary to address the increasing amounts of electoral expenditure being spent in relation to federal elections' and are set 'at a level that supports the right to take part in public affairs as well as supporting a more level playing field for candidates standing for public office'.<sup>48</sup> As to whether this is a pressing and substantial concern, the explanatory materials provide data from the Australian Electoral Commission (AEC)'s Transparency Register over recent electoral cycles that show the increasing amount of donations by a small number of individuals and 'significantly disproportionate levels of electoral expenditure'.<sup>49</sup>

1.25 Creating the conditions for more people to stand for public office and reducing the influence of big donors over election outcomes would constitute a legitimate objective for the purposes of international human rights law.

#### *Rational connection*

1.26 Under international human rights law, it must also be demonstrated that any limitation on a right has a rational connection 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.

1.27 While gift caps may reduce the influence of some big donors, it appears that the overall proposed gift cap would be at such a level which could potentially still allow for considerable influence over candidates and/or parties (\$640,000). While the annual cap of \$20,000 for gifts to individual candidates may be capable of restricting the influence of an individual donor over a particular recipient, the state and territory and overall caps would still allow a donor to provide substantial monetary gifts to political parties, particularly as state branches of a registered political party are not aggregated with each other or with the federal branch of a party.<sup>50</sup> The explanatory memorandum states that this 'supports political communication by ensuring that electoral participants are not unduly restricted from engaging in a broad range of political communication if they have interests in a number of matters'.<sup>51</sup> However, no information is provided in the explanatory materials as to whether this may disproportionately impact the ability of independents and smaller parties from receiving gifts to facilitate campaigning.

1.28 Similarly, while imposing an expenditure cap may appear to allow more individuals to run for office, the expenditure cap would allow for Australia-wide political parties (such as the Australian Labor Party or the Liberal Party) to spend up to

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<sup>47</sup> Statement of compatibility, p. 16.

<sup>48</sup> Statement of compatibility, p. 17.

<sup>49</sup> Explanatory memorandum, pp. 60-62 and 80-84.

<sup>50</sup> Explanatory memorandum, p. 66.

<sup>51</sup> Explanatory memorandum, p. 65.

\$70 million on broad political advertisements. By contrast, an independent candidate for the House of Representatives would be able to spend just \$800,000. An amount of electoral expenditure is considered to be ‘targeted’ to a division, state or territory where it is incurred for the dominant purpose of creating or communicating an electoral matter, and the electoral matter to which it relates is express coverage matter for the division, state or territory.<sup>52</sup> The explanatory materials provide the example that a political party running a series of television ads that include the party logo and outline the broad policy platform that the party are taking to the election is not captured under a division or state or territory cap where it does not include the name, image or likeness of any candidate or explicitly mention any division or the Senate election for any state or territory. In this case, it would only be captured under the federal cap.<sup>53</sup> The explanatory materials do not explain whether or how this would *not* have a disproportionate impact on the ability of an unaligned independent candidate to campaign effectively against more well-resourced candidates who are supported by a political party.

1.29 Similarly, the proposal to provide additional electoral funding to existing members of Parliament may similarly operate to support incumbents by compounding the effect of public money received that can then be spent on electoral campaigns. In particular, the advance payment of public funding appears to operate to assist incumbents. The explanatory materials do not explain why this measure is necessary, what impact it may have on non-incumbents and how this supports the objectives of the bill.

1.30 Limiting campaign financing and expenditure may support a legitimate objective, however it must be reasonably adapted such that it does not have the unintended effect of reinforcing the positions of well-established parties and incumbents and creating additional barriers for new candidates to stand.<sup>54</sup> The statement of compatibility does not explain how the proposed measures are intended

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<sup>52</sup> Schedule 4, item 2, proposed section 302ALC. Electoral matter is ‘express coverage matter’ for a division, state or territory if it is communicated to electors enrolled in the division, state or territory, and does either or both of the following: expressly mentions the name, or includes an image or likeness of, a candidate for election; expressly mentions the division or a Senate election for the state or territory, see proposed subsection 302ALC(3).

<sup>53</sup> Explanatory memorandum, p. 90.

<sup>54</sup> International human rights law jurisprudence notes the importance of ensuring all political parties have a level playing field in elections, see UN Human Rights Committee, *Concluding observations on the third period report of Rwanda*, CCPR/C/RWA/CO/3 (2009) [21]; UN Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in Cambodia, Surya P. Subedi*, A/HRC/21/63 (2012) [62]; UN Human Rights Council, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai*, A/HRC/20/27/Add.2 (2012) [90]; United Nations Office of the High Commissioner on Human Rights, *Guidelines for States on the effective implementation of the right to participate in public affairs guidelines* (2018) p. 11. See also, generally, United Nations Convention Against Corruption, articles 5(1) and 7(3).

to achieve the outcomes sought, how these measures may impact some candidates over others, particularly independents and non-incumbents, or how the measures would provide a level playing field. If these measures did provide an unfair advantage to some parties or candidates in practice, this may undermine the stated objectives of the measures. Given the lack of evidence provided to support the effectiveness of the measures and a lack of engagement with the public concerns that it will disproportionately limit the capacity of independent candidates to campaign effectively in federal elections, it is unclear whether the measures are rationally connected (that is, effective to achieve) the legitimate objectives.

### *Proportionality*

1.31 As to whether the limitations on the right to participate in public affairs and freedom of expression are proportionate, it is relevant to consider a number of factors, including whether the measures are accompanied by adequate safeguards, including access to review, and pursue the least rights restrictive means of achieving the stated objectives.

1.32 The statement of compatibility explains that the measures are ‘proportionate to the benefit that will be gained by the public from the improved public confidence in the political system resulting from the proportional limits on political donations’ and ‘are proportionate to the benefit that will be gained by addressing extreme instances of electoral expenditure creating a real, or perceived, sense that political participation is only achievable for those backed by “big money”’.<sup>55</sup>

1.33 As to safeguards, the bill would provide for review of the operation of the amendments by the Joint Standing Committee on Electoral Matters (JSCEM) (or another parliamentary committee determined by the minister) within 12 months after the first general election held after 1 July 2026 and report to each House of the Parliament.<sup>56</sup> Further, in relation to the cap on electoral expenditure, the bill would establish some exceptions where the expenditure is spent on candidate travel and accommodation expenses and translation services.<sup>57</sup> As the statement of compatibility explains, this is ‘so as to not disproportionately impact candidates in regional or remote electorates or candidates in culturally and linguistically diverse electorates’.<sup>58</sup> These safeguards may assist somewhat with proportionality, where they addressed any financing concerns relevant to remote or culturally and linguistically diverse electorates. However, it is not clear what (if any) safeguard value these would have in respect of any disproportionate impact on the ability of independent candidates to campaign effectively for candidacy.

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<sup>55</sup> Statement of compatibility, pp. 16-17.

<sup>56</sup> Item 4.

<sup>57</sup> Schedule 4, item 2, proposed section 302AQC.

<sup>58</sup> Statement of compatibility, p. 17.

1.34 As to whether the measures pursue the least rights restrictive means of achieving the stated objectives, the explanatory materials do not address whether other alternatives have been considered and why these are not appropriate. The explanatory materials state that the gift caps and expenditure caps were recommended by the JSCEM Interim Report.<sup>59</sup> However, JSCEM stated that such caps should be based on evidence the committee had received, and should have regard to being based at a level that recognises ‘the additional hurdles to entry faced by independents or new entrants’ and, in relation to expenditure caps, considering having caps ‘higher for independent candidates, noting they generally have less existing structural support than candidates endorsed by a national political party’. The explanatory materials do not explain whether and how the proposed caps have regard to additional barriers faced by independent candidates, and whether less rights restrictive alternatives (such as identifying any structural disadvantages some individuals may face over others and introducing measures to counteract them) would be ineffective to achieve the stated objectives of the measures. As such, it remains unclear whether these measures may constitute a permissible limit on the right to participate in public affairs and the right to freedom of expression. As a result, were the measure to indirectly disadvantage people from standing for election based on a protected characteristic (such as their sex), it is also unclear whether the measure would constitute permissible differential treatment.

### **Committee view**

1.35 The committee notes that this bill seeks to cap the provision of electoral financing gifts and permissible electoral expenditure. The committee notes that the stated intention of the measure is to limit the influence of big donors and allow for more individuals and entities to participate in political debate. The committee considers that, to the extent the measure may achieve this in practice, it may promote the right to take part in public affairs and the right to freedom of expression.

1.36 However, the committee further notes that these measures, and the measure to provide additional public election funding, may also limit the rights to take part in public affairs, the right to freedom of expression and the right to equality and non-discrimination.

1.37 The committee considers further information is required to assess the compatibility of this measure with these rights, and as such seeks the minister's advice in relation to:

- (a) how were the proposed gift caps and expenditure caps calculated and what consideration was given to the effect on non-incumbents and independents in arriving at these figures;

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<sup>59</sup> Joint Standing Committee on Electoral Matters (JSCEM), *Conduct of the 2022 federal election and other matters: Interim Report* (19 June 2023) pp. 66-67.

- (b) whether and how it has been established that the proposed gift caps and expenditure caps will not disproportionately impact independent and non-incumbent candidates for federal elections;
- (c) whether these measures may have a disproportionate impact on the ability of marginalised groups (for example, women, or people from ethnic minorities) from engaging in public affairs by standing for election, and if so whether this would constitute permissible differential treatment;
- (d) why the advance on public funding is considered necessary and what impact this may have on independents and non-incumbents;
- (e) what evidence supports these measures being rationally connected to (that is, effective to achieve) the legitimate objectives sought; and
- (f) why other less rights restrictive alternatives would be ineffective to achieve the stated objective.

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### Reducing the donations disclosure threshold

1.38 The *Commonwealth Electoral Act 1918* currently requires that a donation of \$16,900 and over must be disclosed publicly to the AEC Transparency Register.<sup>60</sup> Schedule 1 of the bill seeks to reduce that disclosure threshold to \$1,000 (subject to indexation on 1 January after each general election).<sup>61</sup> Schedule 2 of the bill would also require such donations to be disclosed to the AEC more frequently.<sup>62</sup> Disclosure timeframes vary depending on the recipient but, generally, relevant gifts must be disclosed before the end of the 21<sup>st</sup> day of each month, within 7 days during the ‘election period’<sup>63</sup> and, for donors during the ‘expedited notice period’,<sup>64</sup> within 24 hours.<sup>65</sup> Recipients and donors who do not disclose within the relevant timeframe would be subject to a civil penalty of the higher of 60 penalty units (currently, \$19,800) or 3 times the amount or value of the relevant gift.<sup>66</sup>

1.39 Gift donations over the disclosure threshold, or aggregated to an amount which is over the disclosure threshold, are published on the AEC Transparency Register. The

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<sup>60</sup> Commonwealth Electoral Act 1918, Division 4 (disclosure of donations).

<sup>61</sup> Schedule 1, item 10, proposed subsection 287(1)(definition of *disclosure threshold*).

<sup>62</sup> Schedule 2, item 4, proposed sections 303A and 303E.

<sup>63</sup> ‘Election period’ means the period beginning on the issue of the writ for the election until close of polls, see Schedule 2, item 4, proposed section 303.

<sup>64</sup> ‘Expedited notice period’ means the period beginning on the Saturday immediately preceding the polling day for the election and ending seven days after that polling day, see Schedule 2, item 4, proposed section 303.

<sup>65</sup> Schedule 2, item 4, proposed subsections 303A(2) and 303E(2).

<sup>66</sup> Schedule 2, item 4, subsections 303A(1) and 303E(1).

Australian Electoral Commissioner would be required to publish information provided in a return within 24 hours of receiving it.<sup>67</sup> The Australian Electoral Commissioner would be required to publish the following information in relation to a gift:

- the name of the person or entity that received the gift;
- the name of the donor;
- if the recipient is a candidate in an election or by-election, a member of the House of Representatives or a Senator, the registered political party (if any) that the recipient is related to;
- the amount or value of the gift;
- the date on which the gift was made;
- if the gift was made during the election period for a by-election or Senate-only election, the name of the division or the state or territory to which the election relates;
- if the total amount or value of all gifts received by the recipient from the donor during the calendar year in which the gift was received is more than the disclosure threshold, the total amount or value of all gifts so far received; and
- any other gift received by the donor if the earlier gift was used wholly or partly to enable the donor to make the gift, or reimburse the donor for the gift, to which the donation disclosure notice relates and the amount or value of the earlier gift is more than the disclosure threshold.<sup>68</sup>

1.40 The Australian Electoral Commissioner would have the power to redact or remove personal information (within the meaning of the *Privacy Act 1988*) required to be published, or decide not to include information in the AEC Transparency Register, if the Australian Electoral Commissioner were satisfied that the publication of the information places, or would place, the personal safety of a person or of members of the person's family, at risk.<sup>69</sup>

## **Preliminary international human rights legal advice**

### ***Rights to privacy; take part in public affairs***

1.41 By lowering the disclosure threshold, a greater number of donations (and potentially individual donors) would be subject to publication of personal information on the AEC Transparency Register. This would engage and limit the right to privacy. Further, if this requirement resulted in individuals choosing not to donate to avoid personal information about their political preferences being included on the AEC

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<sup>67</sup> Schedule 2, item 4, proposed section 303J.

<sup>68</sup> Schedule 2, item 4, subsection 303J(1).

<sup>69</sup> Schedule 5, item 21, proposed paragraph 320(1)(1A).

Transparency Register, this measure may engage and limit the right to take part in public affairs.

1.42 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.<sup>70</sup> It also includes the right to control the dissemination of information about one's private life. The right to take part in public affairs is set out above. It includes the right of every citizen to take part in the conduct of public affairs by exerting influence through public debate and dialogues with representatives either individually or through bodies established to represent citizens.<sup>71</sup>

1.43 These rights 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.

1.44 The statement of compatibility identifies only that this measure may engage and limit the right to privacy.<sup>72</sup> In relation to the legitimate objective, the statement of compatibility identifies that this measure limits the right to privacy in order to support the right to political participation 'by enabling voters to access information about political financing when exercising their right to vote'.<sup>73</sup> Providing for transparency in financial contributions to political parties and candidates is likely a legitimate objective for the purposes of international human rights law. Lowering the disclosure threshold so more political financing information is publicly available appears rationally connected to (that is, effective to achieve) that objective. However, the statement of compatibility provides no information as to why \$1,000 represents the threshold at which donations may influence electoral outcomes. It merely states that other jurisdictions require the publication of donor information for donations of \$1,000 or more.<sup>74</sup>

1.45 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 factors, including whether a proposed limitation is sufficiently circumscribed; whether it is accompanied by sufficient safeguards; and whether any less rights restrictive alternatives could achieve the same stated objective.

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<sup>70</sup> International Covenant on Civil and Political Rights, article 17.

<sup>71</sup> International Covenant on Civil and Political Rights, article 25. See also UN Human Rights Council, *General Comment No.25: Article 25, Right to participate in public affairs, voting rights and the right of equal access to public service* (1996) [1],[5]-[6].

<sup>72</sup> Statement of compatibility, p. 9.

<sup>73</sup> Statement of compatibility, p. 9.

<sup>74</sup> Statement of compatibility, p. 10.

1.46 As to whether the measure is sufficiently circumscribed, the statement of compatibility states that:

The disclosure and reporting requirements are not designed to prevent individuals and entities from taking part in election campaigns or standing for public office. The donation disclosure requirements are not arbitrary, only applying to actors engaged in political campaigning. The only amounts required to be disclosed are those made for the purpose of incurring electoral expenditure or creating or communicating electoral matter. As such, the limitation on the right to privacy is appropriately contained to amounts that are relevant to influencing electoral outcomes.<sup>75</sup>

1.47 While the measure is limited to individuals donating for the purpose of incurring electoral expenditure, this would appear to be a broad purpose. Further, lowering the disclosure threshold to \$1,000 would encompass a much larger group of donors, including donors making relatively small contributions to election campaigns. The statement of compatibility does not identify in detail the impact that this lower disclosure threshold may have on the privacy of individuals and bodies such as charity groups making donations, nor does it identify whether lowering the disclosure threshold may have a chilling effect on the willingness of such persons to participate in public affairs by donating.

1.48 As to safeguards, the bill provides that the AEC must publish information provided in a disclosure notice, rather than the notice itself, and personal information such as addresses will not be shared on the AEC Transparency Register.<sup>76</sup> In addition, the bill would allow the Australian Electoral Commissioner to redact or remove personal information if satisfied the publication of the information could put a person's safety at risk.<sup>77</sup> Both of these provisions may serve as useful safeguards. However, it is unclear whether an individual could request the Australian Electoral Commissioner to not include or remove personal information and if such a decision would be reviewable.

### **Committee view**

1.49 The committee notes that the bill seeks to reduce the threshold for which disclosure of an electoral donation must be made public from \$16,900 to \$1,000.

1.50 The committee considers that to the extent that this would provide greater transparency over political donations, this may promote the right to take part in public affairs.

1.51 However, the committee considers that the requirement to publicly disclose a greater number of donations, a process which includes the publication of personal information on the Australian Electoral Commission (AEC)'s Transparency Register,

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<sup>75</sup> Statement of compatibility, p. 10.

<sup>76</sup> Schedule 2, item 4, proposed subsection 303J(1).

<sup>77</sup> Schedule 5, item 21, proposed paragraph 320(1)(1A).



also engages and limits the right to privacy and, if this measure resulted in individuals choosing not to donate to political candidates because they do not want their information to be public, may limit the right to take part in public affairs.

1.52 The committee considers further information is required to assess the compatibility of this measure with these rights, and as such seeks the minister's advice in relation to:

- (a) whether and how lowering the threshold at which donations must be made public constitutes a permissible limit on the right to take part in public affairs;
- (b) why the \$1,000 threshold was determined to represent the threshold at which donations may influence electoral outcomes;
- (c) whether an individual could request the Australian Electoral Commissioner to not include or remove personal information on the public register, and whether such a decision would be reviewable.

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### **Ability to vote in cases of cognitive impairment**

1.53 The Electoral Act provides that a person who, 'by reason of being of unsound mind', is incapable of understanding the nature and significance of enrolment and voting is not entitled to have their name placed or retained on any roll or to vote at any Senate or House of Representatives election.<sup>78</sup> It provides that the Australian Electoral Commissioner shall not remove an elector's name unless an objection has been made and is accompanied by a certificate of a medical practitioner stating that, in their opinion, the elector, because of unsoundness of mind, is incapable of understanding the nature and significance of enrolment and voting.<sup>79</sup>

1.54 Schedule 10 of the bill seeks to substitute the words in both these provisions from 'being of unsound mind' to 'cognitive impairment'.<sup>80</sup>

### **Preliminary international human rights legal advice**

#### ***Rights of persons with disability to equal recognition before the law; take part in public affairs***

1.55 Restricting the circumstances in which an individual is entitled to be enrolled and vote based on cognitive impairment engages and limits the rights of persons with disabilities to equal recognition before the law and the right to take part in public affairs.

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<sup>78</sup> *Commonwealth Electoral Act 1918*, paragraph 93(8)(a).

<sup>79</sup> *Commonwealth Electoral Act 1918*, subsection 118(4).

<sup>80</sup> Schedule 10, item 12, paragraph 93(8)(a).

1.56 The UN Convention on the Rights of Persons with Disabilities (CRPD) reaffirms that all persons with disability are guaranteed all human rights without discrimination, including those rights set out in other human rights treaties. Article 5 of the CRPD guarantees equality for all persons under and before the law and the right to equal protection of the law. It expressly prohibits all discrimination on the basis of disability. Article 12 of the CRPD requires state parties to refrain from denying persons with disabilities their legal capacity, and to provide them with access to the support necessary to enable them to make decisions that have legal effect. The right to equal recognition before the law includes the right to enjoy legal capacity on an equal basis with others in all aspects of life; and in all measures that relate to the exercise of legal capacity, there should be appropriate and effective safeguards to prevent abuse.<sup>81</sup> There can be no derogation from article 12 of the CRPD, which describes the content of the general right to equality before the law under the International Covenant on Civil and Political Rights.<sup>82</sup> This means 'there are no permissible circumstances under international human rights law in which this right may be limited'.<sup>83</sup> As noted previously, the right to take part in public affairs includes guarantees of the right of Australian citizens to vote in elections and is an essential part of democratic government that is accountable to the people.<sup>84</sup> It includes the right and opportunity for persons with disabilities to vote by, among other things, 'guaranteeing the free expression of the will of persons with disabilities as electors and to this end, where necessary, at their request, allowing assistance in voting by a person of their own choice'.<sup>85</sup>

1.57 The UN Committee on the Rights of Persons with Disabilities has stated:

The right to legal capacity is a threshold right, that is, it is required for the enjoyment of almost all other rights in the Convention, including the right to equality and non-discrimination. Articles 5 and 12 are fundamentally connected, because equality before the law must include the enjoyment of legal capacity by all persons with disabilities on an equal basis with others. Discrimination through denial of legal capacity may be present in different ways, including status-based, functional and outcome-based systems.

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<sup>81</sup> Convention on the Rights of Persons with Disabilities, article 12.

<sup>82</sup> Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [1], [5].

<sup>83</sup> Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [5].

<sup>84</sup> UN Human Rights Committee, *General Comment No.25: Article 25, Right to participate in public affairs, voting rights and the right of equal access to public service* (1996).

<sup>85</sup> UN Convention on the Rights of Persons with Disabilities, article 29(a)(iii).

Denial of decision-making on the basis of disability through any of these systems is discriminatory.<sup>86</sup>

1.58 States parties are required to take appropriate measures to provide access to support for persons with disabilities in exercising their legal capacity, such as the provision of advocacy or assistance with communication. The UN Committee on the Rights of Persons with Disabilities has stated that '[s]upport in the exercise of legal capacity must respect the rights, will and preferences of persons with disabilities and should never amount to substitute decision-making'.<sup>87</sup> It noted that 'where, after significant efforts have been made, it is not practicable to determine the will and preferences of an individual, the "best interpretation of will and preferences" must replace the "best interests" determinations'.<sup>88</sup>

1.59 The statement of compatibility does not identify that these provisions engage the rights of persons with disability to equality before the law, or the right to participate in public affairs. The explanatory materials provide no additional information as to the substantive intent and necessity of these measures other than to state that the change 'is intended to be a language modernisation without changing the scope of either provision'.<sup>89</sup>

1.60 Section 93 of the Electoral Act was introduced in 1922, and last amended in 2011. As such, it has never been subject to assessment for compatibility with Australian international human rights law obligations. Further, section 118 (which sets out when the Commissioner may remove a person from the electoral register pursuant to an objection) was introduced in 1966, and last amended in 2020 (not including the relevant provision). As such, it has also not been subject to an assessment for its compatibility with human rights.

1.61 It is unclear whether and how this measure is compatible with the rights of persons with disability to equal recognition before the law or the rights of persons with disability to participate in public affairs.

### **Committee view**

1.62 The committee notes that restricting the circumstances in which an individual is entitled to be enrolled and vote based on cognitive impairment engages and limits

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<sup>86</sup> Committee on the Rights of Persons with Disabilities, *General comment No. 6 (2018) on equality and non-discrimination* (2018) [47].

<sup>87</sup> Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [15]–[17], [21]. The features of a supported decision-making regime are detailed in paragraph [29].

<sup>88</sup> Committee on the Rights of Persons with Disabilities, *General comment No. 1 – Article 12: Equal recognition before the law* (2014) [21].

<sup>89</sup> Explanatory memorandum, p. 172.

the rights of persons with disabilities to equal recognition before the law and the right to take part in public affairs.

1.63 The committee considers further information is required to assess the compatibility of this measure with these rights, and as such seeks the minister's advice in relation to whether and how restricting the circumstances in which an individual is entitled to be enrolled and vote based on cognitive impairment engages and limits the rights of persons with disabilities to equal recognition before the law and the right to take part in public affairs, and in particular:

- (a) when and how an assessment of a person's 'cognitive impairment' for the purposes of section 93 would be undertaken;
- (b) why section 93 does not appear to contemplate the provision of supported decision-making for a person with cognitive impairment to participate in public affairs by voting;
- (c) when and how an objection to a person's eligibility to vote under section 118 based on cognitive impairment would occur in practice, and how it would be assessed;
- (d) how a certificate of the medical practitioner is obtained and used in the decision-making process under section 118, and whether and how this is compatible with Australia's obligation under the UN Convention on the Rights of Persons with Disabilities.

## Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2024<sup>90</sup>

<b>Purpose</b>	The bill seeks to amend the <i>Migration Act 1958</i> to allow the minister to determine that a thing is a prohibited thing in relation to immigration detention facilities and detainees (whether or not they are in an immigration detention facility). It also seeks to expand an authorised officer's power to search, screen and seize prohibited things in relation to immigration detention facilities and detainees without a warrant, if the person exercising the power believes on reasonable grounds that doing so is reasonable and necessary to prevent or lessen risk to the health, safety or security of persons in the facility, or to the order of the facility.
<b>Portfolio</b>	Home Affairs
<b>Introduced</b>	House of Representatives, 21 November 2024
<b>Rights</b>	Rights of the child; freedom of expression; humane treatment in detention; privacy; protection of the family; security of person; torture or cruel, inhuman or degrading treatment or punishment

### Prohibiting items in immigration detention

1.64 This bill seeks to amend the *Migration Act 1958* (Migration Act) to prohibit the possession of certain items by people in immigration detention facilities and detainees (whether or not they are in an immigration detention facility). An 'immigration detention facility' means a detention centre or another place approved by the minister in writing.<sup>91</sup>

1.65 The bill would provide that a thing is a 'prohibited thing' if:

- (a) Possession of the thing is unlawful because of a law of the Commonwealth or of the state or territory in which the person is detained; or
- (b) If the minister has determined by legislative instrument that the item is a prohibited thing.<sup>92</sup>

<sup>90</sup> This entry can be cited as: Parliamentary Joint Committee on Human Rights, Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2024, *Report 11 of 2024*; [2024] AUPJCHR 87.

<sup>91</sup> Schedule 1, item 2, proposed subsection 251A(5).

<sup>92</sup> Schedule 1, item 2, proposed section 251A.

1.66 The minister may determine that a thing is prohibited if the minister is satisfied that possession of the thing is prohibited by a law in a place or places in Australia; or possession or use of the thing 'might be' a risk to the health, safety or security of persons in the facility, or to the order of the facility. It indicates that the following things may be determined to be prohibited things: mobile phones, SIM cards, computers and other electronic devices designed to be capable of being connected to the internet. It also suggests that a medication or healthcare supplement may be determined to be a prohibited thing, providing that if an individual person has a prescription for a specific product, or receives it for their individual use from a health care service provider, it will not be prohibited for them.<sup>93</sup>

1.67 If the thing which is prohibited and has been seized is a device that a person may use to communicate with another person, the bill would provide that, in certain circumstances, the detainee must continue having access to alternative means of communication which are 'reasonably sufficient' to enable the detainee to communicate with a member of the detainee's family unit, or to communicate with any person outside the immigration detention facility to obtain legal advice, obtain other support of a prescribed kind, or communicate governmental or political matters.<sup>94</sup>

1.68 The committee previously considered a substantially similar bill in 2020, including seeking further information from the relevant minister.<sup>95</sup>

### **International human rights legal advice**

#### ***Rights to freedom of expression; privacy; protection of the family; and security of person***

1.69 Prohibiting the possession of certain things by detainees in immigration detention facilities and other places of detention engages several human rights. The explanatory memorandum states that the measure is designed to ensure the safety, security and order in immigration detention facilities.<sup>96</sup> It states that in recent years, the department has observed a significant increase in the orchestration of criminal activities using electronic devices in immigration detention centres, and states that immigration detention facilities now accommodate an increasing number of higher-risk detainees awaiting removal from Australia, often having entered immigration detention directly from a correctional facility.<sup>97</sup> If the measure is able to achieve this objective it could promote the right to security of the person (which the statement of

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<sup>93</sup> Schedule 1, item 2, proposed subsection 251A(3).

<sup>94</sup> Schedule 1, item 2, proposed section 251AB.

<sup>95</sup> Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020. Parliamentary Joint Committee on Human Rights, [Report 7 of 2020](#) (17 June 2020) pp. 69-86; and [Report 9 of 2020](#) (18 August 2020) pp. 147-176.

<sup>96</sup> Explanatory memorandum, p. 3.

<sup>97</sup> Explanatory memorandum, p. 3.

compatibility does not identify this).<sup>98</sup> The right to security of the person requires the state to take steps to protect people against interference with personal integrity by others.<sup>99</sup> This includes protecting people who are subject to death threats, assassination attempts, harassment and intimidation.

1.70 However, the measures also engage and limit a number of other human rights, including the right to privacy, the right to protection of the family, and the right to freedom of expression.

1.71 The bill would provide that a prohibited thing may be an item which is prohibited because its possession is prohibited under an Australian law (such as illegal substances),<sup>100</sup> or where the minister has prescribed the item. The bill includes examples of things that might be 'prohibited things' as being mobile phones, SIM cards and computers or other devices capable of being connected to the internet.<sup>101</sup> It may include prescription and non-prescription medications as well as health care supplements, where the person in possession is not the person to whom they are prescribed.<sup>102</sup> While the precise items to be prohibited remain to be determined by legislative instrument, by setting up the mechanism by which the minister may declare certain items to be prohibited, the bill engages and limits the right to privacy. In particular, prohibiting the possession of mobile phones may interfere with detainees' private life and their right to correspond with others without interference. The right to privacy prohibits arbitrary and unlawful interferences with an individual's privacy, family, correspondence or home.<sup>103</sup> A private life is linked to notions of personal autonomy and human dignity. It includes the idea that individuals should have an area of autonomous development; a 'private sphere' free from government intervention and excessive unsolicited intervention by others.

1.72 Additionally, for persons in detention, the degree of restriction on a person's right to privacy must be consistent with the standard of humane treatment of detained persons.<sup>104</sup> Article 10 of the International Covenant on Civil and Political Rights provides extra protection for persons in detention, who are particularly vulnerable as they have been deprived of their liberty, and imposes a positive duty on states to provide detainees with a minimum of services to satisfy basic needs, including means

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<sup>98</sup> The statement of compatibility does not identify this.

<sup>99</sup> International Covenant on Civil and Political Rights, article 9(1).

<sup>100</sup> The example of illegal substances as defined in the Criminal Code Act 1995 appears to be the only example of an item which may be prohibited pursuant to this aspect of the measure. See statement of compatibility, p. 48.

<sup>101</sup> Schedule 1, item 2, example listed under proposed subsection 251A(2).

<sup>102</sup> Schedule 1, item 2, proposed subsection 251A(3).

<sup>103</sup> International Covenant on Civil and Political Rights, article 17.

<sup>104</sup> Under Article 10(1) of the ICCPR; see *Angel Estrella v Uruguay*, UN Human Rights Committee Communication No. 74/80 (1983) [9.2].

of communication and privacy.<sup>105</sup> Persons in detention have the right to correspond under necessary supervision with families and reputable friends on a regular basis.<sup>106</sup>

1.73 Further, as prohibited things may (and would appear likely to) include mobile phones, SIM cards and computers and other devices capable of accessing the internet, the measure may have an impact on the ability of detainees to be in regular contact with any family that is not detained with them. This may limit the right to respect for the family, which requires the state not to arbitrarily or unlawfully interfere in family life.<sup>107</sup> It would also appear to limit the right to freedom of expression insofar as it would limit the ability of detainees to seek, receive and impart information. 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 in print or through any other media of a person's choice.<sup>108</sup> In this regard, if the thing which is prohibited and has been seized is a device that a person may use to communicate with another person, the bill would provide that, in certain circumstances, the detainee must continue having access to alternative means of communication which are 'reasonably sufficient' to enable the detainee to communicate with a member of the detainee's family unit, or to communicate with any person outside the immigration detention facility to obtain legal advice, obtain other support of a prescribed kind, or communicate governmental or political matters.<sup>109</sup>

1.74 These rights 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.

1.75 The statement of compatibility identifies that these rights are engaged and limited, and provides a brief explanation as to why the limitations are permissible.<sup>110</sup> The explanatory memorandum states that the measure is designed to ensure the safety, security and order in immigration detention facilities.<sup>111</sup> The statement of compatibility states that in recent years, the department has observed an increase in the orchestration of criminal activities using electronic devices in immigration detention centres, and states that immigration detention facilities now accommodate an increasing number of higher-risk detainees awaiting removal from Australia, often

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<sup>105</sup> See UN Human Rights Committee, *General Comment No.21: Article 10 (Humane Treatment of Persons Deprived of their Liberty)* (1992).

<sup>106</sup> *Angel Estrella v Uruguay*, UN Human Rights Committee Communication No. 74/80 (1983) [9.2].

<sup>107</sup> International Covenant on Civil and Political Rights, articles 17 and 23, and the International Covenant on Economic, Social and Cultural Rights, article 10.

<sup>108</sup> International Covenant on Civil and Political Rights, article 19(2).

<sup>109</sup> Schedule 1, item 2, proposed section 251AB.

<sup>110</sup> Statement of compatibility, pp. 51-55.

<sup>111</sup> Explanatory memorandum, p. 3.



having entered immigration detention directly from a correctional facility.<sup>112</sup> Protecting the health, safety and security of people in immigration detention is likely to be a legitimate objective for the purposes of international human rights law. Prohibiting certain items that may enable criminal activity within the immigration detention network also appears to be rationally connected to that objective.

1.76 However, it is not clear that giving the minister the power to prohibit any thing that the minister is satisfied might be a risk to the health, safety or security of persons in the facility, or 'to the order of the facility', is proportionate to the objective sought to be achieved. To be a proportionate limitation on these rights, the limitation should only be as extensive as is strictly necessary to achieve its legitimate objective and must be accompanied by appropriate safeguards.

1.77 For immigration detention, supervision of detainees' modes of communication must be understood in the context that detainees are not being detained while serving a term of imprisonment but rather are in administrative detention pending the processing of their application for a visa or for removal from Australia. It is not clear why it is necessary to prohibit items in immigration detention for *all* detainees (whether in the facility or not). The explanatory memorandum notes that immigration detention facilities accommodate a number of higher risk detainees who have entered immigration detention directly from a correctional facility, including members of outlaw motorcycle gangs and other organised crime groups.<sup>113</sup> However, the bill would apply to all detainees regardless of whether or not they pose a risk. This appears to include, for example, persons detained while awaiting determination of their refugee status, or those who have overstayed their visa and are detained prior to removal, who may not pose any risk of the kind described in the statement of compatibility. Yet as the bill is currently drafted this measure would prohibit even those who pose no risk from having things such as mobile phones that allow them to communicate with family and friends.

1.78 Another relevant consideration in determining the proportionality of the broad rule-making power conferred on the minister is whether there are adequate safeguards or controls over the measures. International human rights law jurisprudence states that laws conferring discretion or rule-making powers on the executive must indicate with sufficient clarity the scope of any such power or discretion conferred on competent authorities and the manner of its exercise.<sup>114</sup> This is because, without sufficient safeguards, broad powers may be exercised in such a way as to be incompatible with human rights.

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<sup>112</sup> Explanatory memorandum, p. 3.

<sup>113</sup> Explanatory memorandum, p. 3.

<sup>114</sup> *Hasan and Chaush v Bulgaria*, European Court of Human Rights, Application No. 30985/96 (2000) [84].

1.79 In particular, laws that interfere with rights must specify in detail the precise circumstances in which such interferences may be permitted.<sup>115</sup> As noted earlier, proposed section 251A(2) enables the minister to make a legislative instrument that can determine that any 'thing' is prohibited in an immigration detention facility or for a detainee. The power can be exercised where the minister is satisfied that possession of the thing is prohibited by law or possession or use of the thing in the detention facility 'might be a risk to the health, safety or security of persons in the facility, or to the order of the facility'.<sup>116</sup> The bill provides that if a medication or health care supplement is determined to be prohibited, it will not be prohibited in relation to a particular person if it was prescribed or supplied for their individual use.<sup>117</sup> There is otherwise no limit on the type of 'things' that the minister may prescribe as being prohibited; the bill does not directly prohibit any thing, and the actual things that are to be prohibited are left to be determined by delegated legislation. No information is provided in the statement of compatibility as to how, and under what circumstances, the minister may be satisfied that an item 'might' pose such a risk. In particular, it is not clear what 'things' could pose a risk to the 'order' of the facility, and what evidence the minister would need to have to satisfy themselves that a thing would reasonably result in any such risk.

1.80 If a determination is made prohibiting access to mobile phones and other electronic devices that connect to the internet, *and* a person's phone or device was subsequently seized, the bill would require the departmental secretary to ensure that the detainee is given access to an alternative means of communication that is reasonably sufficient to enable them to communicate with their family, or with a person outside the facility for a number of purposes. The explanatory memorandum states that '[w]hat is reasonably sufficient under subsection 251AB(2) will be dependent on what could objectively be considered sufficient in the particular circumstances, and not what an individual detainee subjectively considers to be sufficient'.<sup>118</sup> The statement of compatibility states that:

These options include, although are not limited to, landline telephones, internet access, postal services and other reasonably available communication device options.<sup>119</sup>

1.81 When these measures were proposed (in 2020), the statement of compatibility accompanying that bill identified a number of factors that applied to detainees using landline, internet and other communications facilities:

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<sup>115</sup> UN Human Rights Committee, *General Comment No.16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation* (1988) [8].

<sup>116</sup> Schedule 1, item 2, proposed section 251A.

<sup>117</sup> Schedule 1, item 2, proposed subsection 251A(3).

<sup>118</sup> Explanatory memorandum, p. 18.

<sup>119</sup> Statement of compatibility, p. 55.

- while landline phones were available 24 hours a day without monitoring, private interview rooms were not always available after hours. In addition, the statement of compatibility stated that additional landline telephones had been installed at 'most' immigration detention facilities, which implies that not all facilities had additional landlines; and
- internet was available, however, an officer monitored the room, filters could block specific websites and immigration officials would retrospectively search any websites that have been accessed by detainees, and the internet search history of detainees.<sup>120</sup> The statement of compatibility also stated that there was a booking system to access the internet and there were 'usually' no delays in the process (implying that there sometimes were delays).<sup>121</sup>

1.82 Little information is provided with respect to this bill as to whether (and to what extent) those limitations remain in place. The statement of compatibility indicates only that the department has reviewed the availability of telephone, internet and other facilities for use by detainees across the immigration detention network, and that consequently additional landline telephones have been installed at 'most immigration detention facilities'.<sup>122</sup> This suggests that there are still immigration detention facilities with insufficient landline phones available for the use of detainees.

1.83 Even in circumstances where telephone and internet use is made available to detainees, this may not provide a similar degree of privacy to the use of a personal mobile phone or device connected to the internet, which could be used in a private location. If the department does continue to monitor the internet usage of *all* detainees using computer rooms, regardless of the level of risk they pose, this also raises questions as to whether these alternative communication mechanisms provide for a sufficient degree of privacy. In addition, mobile telephones have a range of functions that are not available on a landline phone, such as taking photos and videos that may also be used to exercise a detainee's right to freedom of expression (including in relation to conditions of detention). Access to a mobile telephone may also allow detainees more ready access (including via text messages) to family and friends, legal advisors or other support persons, than alternative means of communication. Whether the other alternative communication channels are sufficiently extensive and offer sufficient privacy to allow detainees to communicate with their families will depend on the extent of access available in a specific immigration detention centre (and any associated costs of use). For example, where private rooms with phones are

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<sup>120</sup> Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020. The statement of compatibility stated that the monitoring of internet usage by detainees at that time only occurred on Christmas Island, but that the department was in the process of replicating the monitoring in mainland facilities, see statement of compatibility, p. 40.

<sup>121</sup> Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020, statement of compatibility, pp. 39-40.

<sup>122</sup> Statement of compatibility, p. 55.

accessible to detainees, and that access is readily available (for example, there are a sufficient number of private rooms available so that detainees can access the rooms at short notice and with little wait time), that would assist with the proportionality of the measure in relation to the right to privacy and the right not to be subjected to arbitrary interference with family. However, if such facilities were limited or not readily available or accessible, it is unlikely that the availability of landline phones in private booths and in accommodation areas would overcome the significant impact on detainees' ability to privately communicate with their families, as such facilities do not offer the same level of privacy as the use of a mobile telephone which could be used at any time of day and in a private setting (such as in a detainee's room).

1.84 In addition, the explanatory memorandum states that when a detainee is being removed from Australia,<sup>123</sup> requests by detainees to access legal assistance during their removal 'will be facilitated until such time as it is no longer reasonably practicable to do so', which will depend on the particular operational requirements in the facility.<sup>124</sup> This suggests there may be circumstances in which access to landline phones or the internet may not be available at all times prior to a person's removal from Australia (which could potentially prevent a detainee from obtaining urgent injunctive relief in relation to their removal from Australia). This raises further questions as to the proportionality of the measure.

1.85 Further, the prohibition of items would not only apply to persons who are in immigration detention facilities, but also to those in other places of detention.<sup>125</sup> The explanatory memorandum states:

[E]ven though the Minister's satisfaction is based on the possession or use of the thing in an immigration detention facility [IDF], a determination that a thing is a prohibited thing will apply in relation to detainees who are not detained in, or not about to enter, an IDF, as well as in relation to detainees who are detained in an IDF. Detainees who are the subject of a residence determination will not be subject to the search and seizure provisions in relation to prohibited things.<sup>126</sup>

1.86 Alternative places of detention may include immigration transit accommodation and places in the broader community (for example, hotels and motels).<sup>127</sup> It is not clear what alternative communication options may be available to persons in such alternative places of detention, and how this is connected to the stated legitimate objective of ensuring safety in immigration detention facilities. The requirement proposed in the bill that the departmental secretary must ensure that

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<sup>123</sup> *Migration Act 1958*, section 198.

<sup>124</sup> Explanatory memorandum, p. 11.

<sup>125</sup> Schedule 1, item 2, proposed section 251A.

<sup>126</sup> Explanatory memorandum, p. 9.

<sup>127</sup> Explanatory memorandum, p. 12.

alternative communication facilities are available only arises in relation to people detained in immigration detention centres. It would have no safeguard value with respect to people detained in other places.

### *Concluding remarks*

1.87 Protecting the health, safety and security of people in immigration detention centres and facilities is likely to be a legitimate objective for the purposes of international human rights law, and prohibiting certain items that may enable criminal activity within the immigration detention network also appears to be rationally connected to that objective. However, it does not appear that giving the minister the power to prohibit any 'thing' that the minister is satisfied might be a risk to the health, safety or security of persons in the facility, or 'to the order of the facility', is proportionate to the objective sought to be achieved. The legislation itself would allow a range of things such as mobile phones to be prohibited and therefore liable to search, seizure and screening from detainees. In addition, it does not appear that the alternative means of communication available to detainees who would no longer be able to access mobile phones and internet capable devices would sufficiently protect their right not to have their private and family life arbitrarily or unlawfully interfered with, and their right to freedom of expression. As such, the broad scope of the proposed power to declare items as 'prohibited things' (including mobile phones) means there is a risk that the powers could be exercised in a manner which is not compatible with the rights to privacy and freedom of expression and the right of detainees not to be subjected to arbitrary or unlawful interference with family.

### **Committee view**

1.88 The committee notes that the bill seeks to amend the *Migration Act 1958* to prohibit the possession of certain items by people in immigration detention facilities and detainees (whether or not they are in an immigration detention facility), and would empower the minister to determine that detainees are prohibited from having access to certain things, such as mobile phones and internet enabled devices, in an immigration detention environment.

1.89 The committee notes that it will ordinarily write to proponents of legislation seeking a response to any questions it has about the compatibility of proposed legislation with human rights. However, in this instance, the committee notes that substantial aspects of the bill are identical to the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020, which the committee previously considered in detail.<sup>128</sup>

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<sup>128</sup> Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020. Parliamentary Joint Committee on Human Rights, [Report 7 of 2020](#) (17 June 2020) pp. 69–86; and [Report 9 of 2020](#) (18 August 2020) pp. 147–176. This bill lapsed at the cessation of Parliament and did not pass into law.

1.90 The committee notes that prohibiting the possession of certain things by detainees in immigration detention facilities and other places of detention engages several human rights. The committee notes that the measure is designed to ensure the safety, security and order in immigration detention facilities, and considers that if the measure is able to achieve this objective it could promote the right to security of the person.

1.91 However, the committee notes that this also engages and limits a number of other human rights, including the right to privacy, the right to protection of the family, and the right to freedom of expression.

1.92 The committee notes that these rights may be permissibly limited. However, the committee considers that it does not appear that giving the minister the power to prohibit any 'thing' that the minister is satisfied might be a risk to the health, safety or security of persons in the facility, or 'to the order of the facility', is proportionate to the objective sought to be achieved. The committee notes that the legislation itself would allow a range of things such as mobile phones to be prohibited and therefore liable to search, seizure and screening from detainees. The committee considers that it does not appear that alternative means of communication which may be available to detainees who would no longer be able to access mobile phones and internet capable devices would sufficiently protect their right not to have their private and family life arbitrarily or unlawfully interfered with, and their right to freedom of expression. As such, the committee considers that the broad scope of the proposed power to declare items as 'prohibited things' (including mobile phones) means there is a risk that the powers could be exercised in a manner which is not compatible with the rights to privacy and freedom of expression and the right of detainees not to be subjected to arbitrary or unlawful interference with family.

#### **Suggested action**

1.93 The committee considers the proportionality of this measure may be assisted were the bill amended to require that where a detainee (whether in a detention centre or otherwise) who has had a mobile phone or internet device seized, the department must ensure that they have access to digital communication facilities that will reasonably meet their needs, and enable timely and, where appropriate, private contact with friends, family and legal services.

1.94 The committee recommends that the statement of compatibility be updated to provide a more fulsome analysis of the compatibility of these measures with human rights.

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

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## Search and seizure powers

1.96 The bill also seeks to expand the existing search and seizure powers in the Migration Act with respect to prohibited items (in largely the same manner as was proposed previously in 2020).<sup>129</sup>

1.97 The bill would allow for searches, without a warrant, for a 'prohibited thing', as well as searches for a weapon or other thing capable of being used to inflict bodily injury or to help a detainee escape.<sup>130</sup> This would include the ability to search a person, the person's clothing and any property under the immediate control of the person for a weapon or escape aid or 'prohibited thing' (even if the officer has no suspicion the detainee has such an item),<sup>131</sup> the ability to take and retain possession of such items if found pursuant to a search,<sup>132</sup> and the ability to conduct strip searches to search for such items.<sup>133</sup> The bill also seeks to amend the powers to search and screen persons entering an immigration detention facility (such as visitors), including a power to request persons visiting centres to remove outer clothing (such as a coat) if an officer suspects a person has a weapon or escape aid or a prohibited thing in his or her possession, and to leave the prohibited thing in a place specified by the officer while visiting the immigration detention facility.<sup>134</sup> The bill would also give the minister the power to make a legislative instrument that directs authorised officers to seize a thing in relation to: specified classes of person; specified things or classes of thing; specified immigration detention facilities; or specified circumstances.<sup>135</sup> These powers would only be exercisable if the purpose of doing so were to 'prevent or lessen an immigration detention facility risk'.<sup>136</sup>

1.98 The bill would also provide that an authorised officer may, without a warrant, conduct a search of an immigration detention facility including accommodation areas, common areas, detainees' personal effects, detainees' rooms, and storage areas.<sup>137</sup> In conducting such a search, an authorised officer 'must not use force against a person or property, or subject a person to greater indignity, than is reasonably necessary in order to conduct the search'.<sup>138</sup>

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<sup>129</sup> Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020.

<sup>130</sup> Section 252A of the *Migration Act 1958*.

<sup>131</sup> Schedule 1, item 7, proposed subsections 252AA(1) and (1A).

<sup>132</sup> Schedule 1, item 5, proposed subsections 252(4) and (4A).

<sup>133</sup> Schedule 1, item 11, proposed subsection 252A(1).

<sup>134</sup> Schedule 1, items 29-37 to amend existing section 252G.

<sup>135</sup> Schedule 1, item 2, proposed subsection 251B(6).

<sup>136</sup> Schedule 1, item 2, proposed subsection 251AA(1).

<sup>137</sup> Schedule 1, item 19, proposed section 252BA.

<sup>138</sup> Schedule 1, item 19, proposed subsection 252BA(7).

1.99 The bill also proposes to allow for 'other persons' to assist authorised officers in carrying out their search of an immigration detention facility.<sup>139</sup> Such a person would have most of the same powers as an authorised officer (not including the power to strip search detainees), subject to any directions given by the authorised officer.<sup>140</sup>

1.100 The bill would also provide for the return of seized items in certain circumstances, including on a temporary basis.

### **International human rights legal advice**

#### ***Prohibition against torture or cruel, inhuman or degrading treatment or punishment; right to humane treatment in detention; right to an effective remedy***

1.101 By providing authorised officers with the power to conduct strip searches to find out whether there is a 'prohibited thing', weapon, or escape aid,<sup>141</sup> or to use force to search them,<sup>142</sup> the measure may engage the prohibition against torture, cruel, inhuman and degrading treatment or punishment. Article 7 of the International Covenant on Civil and Political Rights provides that no person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.<sup>143</sup> This is an absolute right, and no limitation on this right is permissible under international human rights law. The aim of article 7 is to protect both the dignity and the physical and mental integrity of the individual.<sup>144</sup>

1.102 The amended search and seizure powers may also engage the right to humane treatment of persons in detention,<sup>145</sup> which provides that all people deprived of their liberty must be treated with humanity and dignity. It applies to everyone in any form of state detention, including immigration detention, and to privately run detention centres where they are administered under the law and authority of the state. The right provides extra protection for persons in detention, who are particularly vulnerable as they have been deprived of their liberty. This right complements the prohibition on torture, cruel, inhuman and degrading treatment or punishment,<sup>146</sup> such that there is a positive obligation on Australia to take actions to prevent the

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<sup>139</sup> Schedule 1, item 19, proposed section 252BB.

<sup>140</sup> Schedule 1, item 19, proposed subsection 252BB(2).

<sup>141</sup> Schedule 1, items 11-14.

<sup>142</sup> Schedule 1, item 19, proposed subsection 252BA(7).

<sup>143</sup> The prohibition against torture, cruel, inhuman or degrading treatment or punishment is also protected by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

<sup>144</sup> UN Human Rights Committee, *General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)* (1992) [2].

<sup>145</sup> International Covenant on Civil and Political Rights, article 10.

<sup>146</sup> International Covenant on Civil and Political Rights, article 7.



inhumane treatment of detained persons.<sup>147</sup> Australia has obligations under international law regarding the investigation of, and provision of compensation for, complaints of mistreatment in detention.

1.103 The UN Human Rights Committee has indicated that United Nations standards applicable to the treatment of persons deprived of their liberty are relevant to the interpretation of articles 7 and 10 of the International Covenant on Civil and Political Rights.<sup>148</sup> In this respect, the United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules) state that intrusive searches (including strip searches) should be undertaken only if absolutely necessary, that prison administrations shall be encouraged to develop and use appropriate alternatives to intrusive searches, and that intrusive searches shall be conducted in private and by trained staff of the same sex as the prisoner.<sup>149</sup> Further, the European Court of Human Rights (ECHR) has found that strip searching of detainees may violate the prohibition on torture and cruel, inhuman or degrading treatment or punishment where it involves an element of suffering or humiliation going beyond what is inevitable for persons in detention.<sup>150</sup> While the court accepted that strip searches may be necessary on occasion to ensure prison security or to prevent disorder or crime, the court emphasised that prisoners must be detained in conditions which are compatible with respect for their human dignity.<sup>151</sup> While the jurisprudence of the ECHR is not binding on Australia, the views of the court in relation to the prohibition on torture, cruel, inhuman or degrading treatment or punishment may be instructive in determining the scope of Australia's human rights obligations.

1.104 The statement of compatibility does not acknowledge whether the right to freedom from torture, cruel, inhuman and degrading treatment or punishment is engaged, but does acknowledge that the amendments to the search and seizure powers may engage the right to be treated humanely.<sup>152</sup> It states that existing provisions and amendments in the bill contain protections designed to protect detainees and their property.<sup>153</sup> It notes that strip searches must first be authorised by a departmental official or the Australian Border Force Commissioner, or for a child 10

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<sup>147</sup> UN Human Rights Committee, *General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of their Liberty)* (1992) [3].

<sup>148</sup> UN Human Rights Committee, *General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of their Liberty)* (1992) [10].

<sup>149</sup> Rule 52(1) of the *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*.

<sup>150</sup> *Frerot v France*, European Court of Human Rights, Application No. 70204/01 (2007) [35]-[49].

<sup>151</sup> *Frerot v France*, European Court of Human Rights, Application No. 70204/01 (2007) [35]-[49].

<sup>152</sup> Statement of compatibility, pp. 55-56.

<sup>153</sup> Statement of compatibility, p. 56.

to 17 years old, by a magistrate. It also notes that the Migration Act<sup>154</sup> requires that a strip search of a detainee:

- (a) must not subject the detainee to greater indignity than is reasonably necessary to conduct the strip search;
- (b) must be conducted in a private area;
- (c) must not be conducted on a detainee who is under 10;
- (d) must not involve a search of the detainee's body cavities;
- (e) must not be conducted with greater force than is reasonably necessary to conduct the strip search.

1.105 It also notes that the bill introduces a requirement that an authorised officer who conducts a search must not use more force against a person, or subject a person to greater indignity, than is reasonably necessary in order to conduct the search. As such, the statement of compatibility states that the amendments are consistent with the right to humane treatment in detention as there are sufficient protections provided by law to ensure that respect for detainees' inherent dignity is maintained during the conduct of searches.<sup>155</sup>

1.106 The safeguards set out in the statement of compatibility and contained in section 252A of the Migration Act indicate that there is some oversight over the conduct of strip searches. However, the power to conduct strip searches is currently limited to circumstances where there are reasonable grounds to suspect a detainee may have hidden in his or her clothing a weapon or other thing capable of being used to inflict bodily injury or to help the detainee escape from detention.<sup>156</sup> The amendments will extend this power to where an officer suspects on reasonable grounds that a person may have hidden on the person a 'prohibited thing', such as a mobile telephone.<sup>157</sup> Given the broad power of the minister to declare an item a 'prohibited thing' (as discussed above), this considerably expands the bases on which strip searches can be conducted, which raises significant questions as to whether the expanded powers to conduct strip searches are consistent with the requirement under international human rights law that strip searches only be conducted when absolutely necessary. Even if such an approach were taken as a matter of policy and practice, discretionary or administrative safeguards alone would likely be insufficient for the purpose of establishing a permissible limitation under international human rights law because they are less stringent than the protection of statutory processes and can be amended or removed at any time. As a matter of law, proposed subsection 251B(5) provides that strip searches may be conducted irrespective of whether a search or

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<sup>154</sup> *Migration Act 1958*, subsection 252B(1).

<sup>155</sup> Statement of compatibility, p. 56.

<sup>156</sup> *Migration Act*, subsection 252A(1).

<sup>157</sup> Schedule 1, item 14, proposed paragraph 252A(3)(a).

screening procedure is conducted under sections 252 and 252AA<sup>158</sup> (which are less intrusive).

1.107 In relation to the power of authorised officers to use force to conduct searches of immigration detention facilities, while the power limits the use of force to no more force than is reasonably necessary in order to conduct the search, no information is provided in the statement of compatibility as to whether there is any oversight over the exercise of that power, such as consideration of any particular vulnerabilities of the detainee who is subjected to the use of force, and any access to review to challenge the use of force.

1.108 The bill does not indicate whether any monitoring and oversight mechanisms over the use of force by authorised officers and their assistants exist, such as access to review for detainees to challenge the use of force and the strip search powers. In 2020, the then minister advised the committee that persons in immigration detention have the right to lodge complaints while they are in detention, to the department or its contractors or to the Australian Human Rights Commission, the Commonwealth Ombudsman or the Australian Red Cross.<sup>159</sup> Such internal and external mechanisms would offer a degree of oversight and access to review for persons subject to the new search and seizure powers or use of force provisions in the bill. However, they may not be sufficient for the purpose of ensuring compliance with the prohibition on degrading treatment, particularly where the oversight mechanisms are internal and discretionary or administrative, and taken in the context of the broadened power to conduct strip searches or use force in the proposed law. The UN Human Rights Committee has held that complaints against maltreatment must be investigated promptly and impartially by competent authorities,<sup>160</sup> that compensation must be available to victims of such treatment, and any perpetrators of such treatment must be appropriately punished.<sup>161</sup> It is unclear that the policies meet these standards. This raises a further concern that there may not be adequate protection of the right to an effective remedy for violations of human rights.

1.109 There is also no information in the statement of compatibility as to what training a person who conducts a strip search, or search involving the use of force,

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<sup>158</sup> *Migration Act 1958*, sections 252 (searches of detainees) and 252AA (screening of detainees).

<sup>159</sup> Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020. Parliamentary Joint Committee on Human Rights, [Report 9 of 2020](#) (18 August 2020) p. 168.

<sup>160</sup> *Kalamiotis v Cyprus*, UN Human Rights Committee Communication No. 1486/2006 (2008) [7.3].

<sup>161</sup> See *Guridi v Spain*, Committee Against Torture Communication No. 212/2002 (2005) [6.6]-[6.8].

must have in the use of such powers.<sup>162</sup> An 'authorised officer' is defined in the Migration Act to mean an officer authorised in writing by the minister, the secretary of the department or the Australian Border Force Commissioner.<sup>163</sup> There does not appear to be any legislative requirement that such officers be trained in the use of force or how to conduct strip searches. Further, the extension of authorised officers' powers to an assistant<sup>164</sup> raises concerns as to whether there are adequate safeguards. Proposed subsection 252BB(2) sets out the powers that an authorised officer's assistant would have in relation to a search of an immigration facility, to enter and to exercise many of the same functions and duties as are conferred on the authorised officer. However, no information is provided in the explanatory materials about who the authorised officers' assistants will be, or what training or qualifications they will be required to have.

1.110 In the absence of legislative protections within the Migration Act for effective oversight of the search and seizure powers and the use of force (including compensation for any mistreatment), there is some risk that in practice the exercise of the proposed powers may not comply with the prohibition on degrading treatment or may constitute inhumane treatment of persons in detention.

### ***Rights to security of the person, privacy and bodily integrity, and children's rights***

1.111 The statement of compatibility states that expanded search and seizure powers will better enable the management of risks to detainees and people working in immigration detention facilities posed by the infiltration of illicit drugs and controlled substances in the immigration detention environment.<sup>165</sup> If the measure is able to achieve this objective it could promote the right to security of the person (which is defined above).

1.112 However, the screening of detainees, conducting strip searches of detainees, and searches of immigration detention facilities also engage and limit the right to privacy. For persons in detention, the degree of restriction on a person's right to privacy must be consistent with the standard of humane treatment of detained persons.<sup>166</sup>

1.113 The right to privacy extends to protecting a person's bodily integrity. Bodily searches, and in particular strip searches, are an invasive procedure and may violate a

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<sup>162</sup> The statement of compatibility states that authorised officers 'will be provided with training and guidance', but does not provide any explanation of any training required for the use of search powers. See statement of compatibility, p. 49.

<sup>163</sup> *Migration Act 1958*, section 5.

<sup>164</sup> Schedule 1, item 19, proposed section 252BB.

<sup>165</sup> Statement of compatibility, p. 52.

<sup>166</sup> Under Article 10(1) of the International Covenant on Civil and Political Rights; see *Angel Estrella v Uruguay*, UN Human Rights Committee Communication No. 74/80 (1983) [9.2].

person's legitimate expectation of privacy. The amendments to expand the permissible searches of persons, including strip searches, to seize prohibited items therefore engage and limit the right to bodily integrity. The UN Human Rights Committee has emphasised that personal and body searches must be accompanied by effective measures to ensure that such searches are carried out in a manner consistent with the dignity of the person who is being searched, and further that persons subject to body searches should only be examined by persons of the same sex.<sup>167</sup>

1.114 Further, while the Migration Act prohibits strip searches of children under the age of 10,<sup>168</sup> children who are detained in immigration facilities between the ages of 10 and 18 may be subject to the search and seizure powers, including strip searches, under specified conditions.<sup>169</sup> In this respect, a number of Australia's obligations under the Convention on the Rights of the Child (CRC) are engaged. In particular, the amended search and seizure powers may engage article 16 of the CRC, which provides that no child shall be subject to arbitrary or unlawful interference with his or her privacy. The bill may also engage article 37 of the CRC which provides (relevantly) that children must not be subjected to torture or other cruel, inhuman or degrading treatment or punishment,<sup>170</sup> and that every child deprived of their liberty shall be treated with humanity and respect for the inherent dignity of the human person.<sup>171</sup> While only a small number of children are currently detained in an immigration detention facility,<sup>172</sup> the detention of children in such facilities is not prevented as a matter of law.

1.115 The right to privacy (including the right to bodily integrity) and many 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.<sup>173</sup>

1.116 The statement of compatibility does not specifically acknowledge that the rights of the child in particular are engaged or limited by the bill. It does acknowledge that the new search and seizure powers engage and 'represent a limitation on the right

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<sup>167</sup> UN Human Rights Committee, *General Comment No.16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation* (1988) [8].

<sup>168</sup> *Migration Act 1958*, paragraph 252B(1)(f).

<sup>169</sup> The Migration Act provides that for a detainee who is at least 10 but under 18, only a magistrate may order a strip search: subparagraph 252A(3)(c)(ii).

<sup>170</sup> Convention on the Rights of the Child, article 37(a).

<sup>171</sup> Convention on the Rights of the Child, article 37(c).

<sup>172</sup> At 30 September 2024, there were less than five children in immigration detention facilities and alternative places of detention. Department of Home Affairs, [Immigration Detention and Community Statistics Summary](#) (September 2024), p. 10.

<sup>173</sup> However, the prohibition of torture (enshrined in Article 37(a) of the Convention on the Rights of the Child) is an absolute right, which cannot be derogated from, or limited, for any reason.

to detainees' privacy'.<sup>174</sup> In this respect, the statement of compatibility notes that the objective of the bill is to 'provide for a safe and secure environment for people accommodated at, visiting or working at an immigration detention facility'. The statement of compatibility explains that immigration detention facilities now accommodate an increasing number of higher risk detainees awaiting removal, who have often entered immigration detention directly from a correctional facility, including members of outlaw motorcycle gangs and other organised crime groups.<sup>175</sup> As such, the statement of compatibility states that the limitation on the right to privacy is proportionate as it is 'commensurate to the risk that currently exists in immigration detention facilities'.<sup>176</sup>

1.117 Protecting the health, safety and security of people in immigration detention is likely to be a legitimate objective for the purposes of human rights law, and it may be that broadening the search and seizure powers may be effective to achieve (that is, rationally connected) to that objective. However, the measure must also be demonstrated to be proportionate to the objective sought to be achieved, and this requires that it be the least rights restrictive way to achieve the stated objective and that there be sufficient safeguards in place to protect vulnerable people.

1.118 The bill would provide that the power to search, screen and seize items would only be authorised where it is for the purpose of preventing or lessening an immigration detention facility risk. The explanatory memorandum states:

For example, an authorised officer's decision to seize a mobile phone or a SIM card (if such things are determined to be prohibited things) from a detainee would be made taking into account a range of considerations including, but not limited to, the existence of police recommendations or relevant court orders in relation to the detainee, and whether the detainee is a registered sex offender or has a history of child sex offences. The amendments will also allow for a targeted, intelligence-led, risk based approach in relation to the seizure of prohibited things from detainees, by allowing the Minister to issue binding written directions that make it mandatory for officers to seize items that are covered by their seizure powers.<sup>177</sup>

1.119 However, it is not clear why it is necessary to prohibit items in immigration detention, and search for and seize such items, from *all* detainees (whether in the facility or not). While the explanatory memorandum suggests that the conduct of searches of individual detainees *may* be conducted by reference to an assessment of the particular level of risk which that person may pose, it would appear that such searches could also be authorised in order to prevent or lessen some broader

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<sup>174</sup> Statement of compatibility, p. 52.

<sup>175</sup> Statement of compatibility, p. 51.

<sup>176</sup> Statement of compatibility, p. 52.

<sup>177</sup> Explanatory memorandum, p. 3.

immigration detention facility risk. The level of risk posed by persons detained due to the exercise of the minister's character-ground visa cancellation powers is likely to be very different to that posed by people seeking to be recognised as refugees or a tourist having overstayed their visa. The statement of compatibility does not explain why it is necessary to enable authorised officers to search all detainees without a warrant (including strip searches and searches of a detainee's room and personal effects), for 'prohibited things' such as mobile phones. The minister has previously advised the committee that the exercise of such powers by officers would be guided by the department's operational policy framework, which sets out how and when those powers should be used, and noted that while the minister will have the power to direct officers to seize certain prohibited items from all detainees, which will override the exercise of the discretion by authorised officers, it was 'expected' that this power would only be exercised in relation to the most serious circumstances.<sup>178</sup> To the extent that this remains the case, it is noted that operational policies may not be sufficient for the purpose of establishing a permissible limitation under international human rights law, as they are less stringent than the protection of statutory processes and can be amended or removed at any time. It is also not clear what limitations on officers' powers are contained in such operational policy. It is unclear why it is necessary and appropriate that such warrantless powers should apply without any need for the officer to have formed a reasonable suspicion that the persons possess such items, or that the minister can make such a direction in relation to all prohibited things.

1.120 In relation to the power to strip search to locate and seize a 'prohibited thing', no information is provided in the statement of compatibility as to whether consideration has been given to alternative and less-intrusive methods of searching for prohibited items prior to conducting a strip search. For example, in relation to mobile telephones, it is unclear why it would be necessary to undertake a strip search when alternative and less intrusive screening methods, such as a walk-through metal detector, may adequately identify if a mobile phone is in a person's possession. It would appear that a strip search is not necessarily a method of last resort, as proposed subsection 251B(5) provides that strip searches may be conducted irrespective of whether a search or screening procedure is conducted under sections 252 and 252AA<sup>179</sup> (which are less intrusive). This raises concerns as to whether this aspect of the bill is the least rights restrictive option available.

1.121 While there are limitations placed on the power to conduct strip searches (such as a requirement that an officer must suspect 'on reasonable grounds' that a person may have items hidden on them, and it is necessary to conduct a strip search to

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<sup>178</sup> Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020. Parliamentary Joint Committee on Human Rights, [Report 9 of 2020](#) (18 August 2020) p. 152.

<sup>179</sup> *Migration Act 1958*, sections 252 (searches of detainees) and 252AA (screening of detainees).

recover the item<sup>180</sup>), the bases on which an officer may form a suspicion on reasonable grounds are broad. In particular, one of the bases on which an officer may form a suspicion on reasonable grounds is based on 'any other information that is available to the officer'.<sup>181</sup> The statement of compatibility does not explain what 'any other information' may entail.

1.122 In light of the broad nature of the power to prohibit, search for and seize 'prohibited things' that is introduced by the bill, and the obligation under international human rights law that limitations on privacy are appropriately circumscribed, there are concerns as to whether this aspect of the bill is a proportionate limitation on the right to privacy (including the right to bodily integrity), and would be compatible with the rights of the child should children be subject to detention.

1.123 In addition, the bill would enable authorised officers and their assistants to conduct searches without the need for any suspicion that a detainee has in their possession any such item.<sup>182</sup> This could enable searches to occur at any time, regardless of any assessment of whether a detainee has such a thing on their body, in their clothing or in their property. While the ability to search for 'prohibited things' would not apply to detainees who are living in residential detention,<sup>183</sup> the search and seizure powers would allow an authorised officer to search such residences, without any need for suspicion, to try to find evidence of any 'document or other thing' that may be evidence for grounds for cancelling the person's visa.<sup>184</sup> It is not clear why it is necessary and appropriate that such warrantless powers should apply, including to those living in residential detention, without any need for the officer to have formed a reasonable suspicion that the persons possess such items.

1.124 In conclusion, while the Migration Act contains a number of safeguards, concerns remain that a number of the circumstances that limit the exercise of power (such as the requirement that strip searches be a measure of last resort), may only be addressed as matters of departmental policy rather than as a safeguard in the legislation. In addition, the bill would allow for searches for prohibited things without the need for the authorised officer to have formed a reasonable suspicion that the persons in question possess such items. It would also empower the minister to direct officers to seize any prohibited thing from all detainees, and this power would not be subject to any legislative limitation. In the absence of such legislative protections within the Migration Act for effective oversight of the search and seizure powers and

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<sup>180</sup> *Migration Act 1958*, paragraphs 252A(3)(a) and (b), as amended by Schedule 1, item 14.

<sup>181</sup> *Migration Act 1958*, paragraph 252A(3A)(c). The other grounds upon which suspicion on reasonable grounds may be formed are based on a search conducted under section 252 or a screening procedure conducted under section 252AA: section 252A(3A)(a) and (b).

<sup>182</sup> Schedule 1, item 4, proposed subsection 252(2). Reasonable suspicion is needed for strip searches.

<sup>183</sup> Schedule 1, item 5, proposed subsection 252(4B).

<sup>184</sup> Schedule 1, item 5, proposed subsection 252(4).



the use of force, the measure risks being an arbitrary interference with the right to privacy (including the right to bodily integrity) and with the rights of the child.

### **Committee view**

1.125 The committee notes that the bill seeks to amend the existing search and seizure powers in the *Migration Act 1958*, including to allow authorised officers and their assistants to strip search, without a warrant, immigration detainees and to search for 'prohibited things' (such as mobile phones).

1.126 The committee considers that if the expanded search and seizure powers effectively enable improved management of risks to detainees and people working in immigration detention facilities posed by the infiltration of illicit drugs and controlled substances in the immigration detention environment, the measure could promote the right to security of the person.

1.127 However, the committee considers that providing authorised officers with the power to conduct strip searches or to use force to search for items may engage the absolute prohibition against torture, cruel, inhuman and degrading treatment or punishment, and the right to humane treatment of persons in detention. The committee notes that the statement of compatibility does not identify the engagement of these rights (despite the committee having noted these concerns when it considered a previous substantially similar bill in 2020). The committee considers that in the absence of legislative protections within the *Migration Act 1958* ensuring effective oversight of the search and seizure powers and the use of force (including compensation for any mistreatment), there is some risk that in practice the exercise of the proposed powers may not comply with the prohibition on degrading treatment or may constitute inhumane treatment of persons in detention. The committee further considers that, given the obligation under international human rights law regarding the investigation and compensation for complaints of mistreatment in detention, there may not be adequate protection of the right to an effective remedy for violations of human rights arising from these measures.

1.128 The committee further considers that the screening of detainees, conducting strip searches of detainees, and searches of immigration detention facilities also engage and limit the right to privacy, and may engage and limit the rights of the child. In this regard, the committee notes that while only a small number of children are currently detained in an immigration detention facility, the detention of children in such facilities is not prevented as a matter of law.

1.129 The committee considers that while the *Migration Act 1958* contains a number of safeguards, concerns remain that a number of the circumstances that limit the exercise of power (such as the requirement that strip searches be a measure of last resort), may only be addressed as matters of departmental policy rather than as a safeguard in the legislation. The committee notes that the bill would allow for searches for prohibited things without the need for the authorised officer to have formed a

reasonable suspicion that the persons in question possess such items, and would empower the minister to direct officers to seize any prohibited thing from all detainees (subject to no legislative limitation on the use of this power). The committee considers that in the absence of such legislative protections within the Migration Act for effective oversight of the search and seizure powers and the use of force, the measure risks being an arbitrary interference with the right to privacy (including the right to bodily integrity) and with the rights of the child.

**Suggested action**

1.130 The committee considers the proportionality of this measure may be assisted were the bill amended to:

- (a) require that strip searches are only used as a measure of last resort and are used only when other less intrusive measures have proven inconclusive or insufficient;
- (b) require authorised officers to receive regular training in the use of force and how to conduct strip searches; and
- (c) include any additional safeguards governing the use of force and search and seizure powers in relation to children as are currently included in departmental policy and related measures.

1.131 The committee recommends that the statement of compatibility be updated to provide a more fulsome assessment of the compatibility of these measures with human rights.

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

## Online Safety Amendment (Social Media Minimum Age) Bill 2024<sup>185</sup>

<b>Purpose</b>	This bill seeks to amend the <i>Online Safety Act 2021</i> to require that providers of ‘age-restricted social media platforms’ must take ‘reasonable steps to prevent’ children aged under 16 years from having accounts with such a platform. It would impose significant civil penalties for failure to comply with this requirement.
<b>Portfolio</b>	Communications
<b>Introduced</b>	House of Representatives, 21 November 2024
<b>Rights</b>	Rights of the child; equality and non-discrimination; freedom of expression; freedom of assembly; health; privacy; effective remedy

### Banning children aged under 16 from certain online platforms

1.133 This bill seeks to amend the *Online Safety Act 2021* (Online Safety Act) to require that providers of ‘age-restricted social media platforms’ must take ‘reasonable steps to prevent’ children aged under 16 years from having accounts with such a platform.<sup>186</sup> Failure to do so would be subject to a civil penalty of 30,000 penalty units (currently \$9,390,000). However, this requirement would not have direct legal effect if the bill were to pass into law. It would only have legal effect if the minister were to specify a day on which this would take effect (by notifiable instrument), which the minister would *not* be required to do.<sup>187</sup>

1.134 An ‘age-restricted social media platform’ would mean an electronic service where: the sole purpose, or a significant purpose, of the service is to enable online social interaction between two or more end-users; the service allows end-users to link to, or interact with, some or all of the other end-users; and the service allows end-users to post material on the service.<sup>188</sup> The minister would also be empowered to make delegated legislation to: impose additional conditions (which would narrow the definition); specify an electronic service (or a class of electronic services) to be an age-restricted social media platform, by delegated legislation; or specify that a particular service is not an age-restricted social media platform.

<sup>185</sup> This entry can be cited as: Parliamentary Joint Committee on Human Rights, Online Safety Amendment (Social Media Minimum Age) Bill 2024, *Report 11 of 2024*; [2024] AUPJCHR 88.

<sup>186</sup> Schedule 1, item 7, proposed section 63D.

<sup>187</sup> Schedule 1, item 7, proposed section 63E (the minister would not be able to specify a date earlier than 12 months after the date the bill were to commence).

<sup>188</sup> Schedule 1, item 7, proposed section 63C.

1.135 The explanatory memorandum notes that ‘the minimum age obligation will, at a minimum, require platforms to implement some form of age assurance to identify Australian users under the age of 16 years’.<sup>189</sup> While the bill does not prescribe what this would require, it would require that if an entity holds personal information about an individual that was collected for the purpose of complying with the minimum age obligation, it may only use or disclose that information to determine whether or not the individual is an age-restricted user; with the consent of the person, or for other limited purposes.<sup>190</sup> It would require that any such personal information must be destroyed in accordance with the *Privacy Act 1988*, if that information is no longer required for any of the purposes for which it was obtained.<sup>191</sup> The bill would also make it a function of the eSafety Commissioner to formulate and promote guidelines for the taking of reasonable steps to prevent age-restricted users from having accounts.<sup>192</sup>

1.136 The eSafety Commissioner would have the power to require a provider to provide information where the eSafety Commissioner believed on reasonable grounds that they have information relevant to compliance with the requirement to prevent children aged under 16 from accessing the platform.<sup>193</sup> The eSafety Commissioner would also be empowered to prepare a platform provider notification if satisfied that the provider of an age-restricted social media platform has contravened either the minimum age obligation or associated privacy obligations, and could publish the statement.<sup>194</sup>

## **International human rights legal advice**

### ***Potential impact on children***

#### *Rights of the child; right to health*

1.137 The statement of compatibility states that the bill is intended to enhance the safety and wellbeing of young people online, and to address the proliferation of harms to children and young people on certain social media platforms by reducing exposure to harmful online content.<sup>195</sup> To the extent that the measure may be effective to achieve that (were it given legal effect by notifiable instrument, and were it to apply to platforms that require an account in order to access them), it would likely promote several human rights.

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<sup>189</sup> Explanatory memorandum, p. 23.

<sup>190</sup> Schedule 1, item 7, proposed section 63F.

<sup>191</sup> Schedule 1, item 7, proposed subsection 63F(3). A failure to destroy the information would be taken to be an interference with the privacy of the individual for the purposes of the *Privacy Act 1988*. Serious and repeated interferences with privacy could result in maximum penalties of at least \$50 million (section 13G of the Privacy Act). See, explanatory memorandum, p 24.

<sup>192</sup> Schedule 1, item 5, proposed subsections 27(1)(qa)–(qb).

<sup>193</sup> Schedule 1, item 7, proposed section 63G.

<sup>194</sup> Schedule 1, item 7, proposed section 63J.

<sup>195</sup> Statement of compatibility, pp. 5 and 11.

1.138 The statement of compatibility states that preventing the data of end-users under the minimum age from being collected (by not allowing them on certain platforms), will reduce the capacity of addictive features on platforms like infinite scrolling and non-user generated feeds. It also states that such data 'can enable a person to be identified or located, allowing for bad actors to cause or contribute to the intentional infliction of physical or mental injury to an individual in Australia'.<sup>196</sup> To the extent that the measure may have this effect, this may promote the right to security of the person,<sup>197</sup> and the right to protection of the child from exploitation.<sup>198</sup> This would also likely promote the right to health, which is the right to enjoy the highest attainable standard of physical and mental health.<sup>199</sup> The statement of compatibility identifies that these measures would likely promote these human rights.<sup>200</sup>

1.139 The statement of compatibility also states that the measure would 'support' the best interests of the child insofar as it would protect them from harms on age-restricted social media platforms.<sup>201</sup>

1.140 Australia is required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration.<sup>202</sup> This requires legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.<sup>203</sup> The UN Committee on the Rights of the Child has explained that:

...the expression "primary consideration" means that the child's best interests may not be considered on the same level as all other

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<sup>196</sup> Statement of compatibility, p. 14.

<sup>197</sup> International Covenant on Civil and Political Rights, article 9(1). The right to security of the person requires the state to take steps to protect people against interference with personal integrity by others. This includes protecting people who are subject to death threats, assassination attempts, harassment and intimidation (including providing protection for people from domestic violence).

<sup>198</sup> Convention on the Rights of the Child, articles 19 and 32.

<sup>199</sup> International Covenant on Economic, Social and Cultural Rights, article 12(1). See also Convention on the Rights of the Child, article 24.

<sup>200</sup> Statement of compatibility, pp. 10–16.

<sup>201</sup> Statement of compatibility, p. 10.

<sup>202</sup> Convention on the Rights of the Child, article 3(1).

<sup>203</sup> 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).

considerations. This strong position is justified by the special situation of the child...<sup>204</sup>

1.141 The child's best interests includes the enjoyment of the rights set out in the Convention on the Rights of the Child, and, in the case of individual decisions, that these 'must be assessed and determined in light of the specific circumstances of the particular child'.<sup>205</sup> The international community has recognised the importance of creating a safer online environment for children,<sup>206</sup> and noted the need to establish regulatory frameworks which enable users to report concerns about content.<sup>207</sup>

*Rights of the child; freedom of expression; freedom of assembly; equality and non-discrimination; privacy*

1.142 However, by restricting the content and platforms to which children aged under 16 may have access (and in which they may form and join groups), this measure may limit the rights of the child including the rights to freedom of expression, freedom of assembly, equality and non-discrimination, and privacy.

1.143 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.<sup>208</sup> The right to freedom of assembly provides that all people have the right to peaceful assembly.<sup>209</sup> This is the right of people to gather as a group for a specific purpose. It is strongly linked to the right to freedom of expression, as it is a means for people together to express their views.

1.144 With respect to children, the United Nations Committee on the Rights of the Child (the body of 18 independent experts that monitors implementation of the Convention on the Rights of the Child by its States parties) has stated that the digital environment provides a unique opportunity for children to realise their right to information:

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<sup>204</sup> UN Committee on the Rights of the Child, *General comment 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013); see also *IAM v Denmark*, UN Committee on the Rights of the Child Communication No.3/2016 (2018) [11.8].

<sup>205</sup> UN Committee on the Rights of the Child, *General comment 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013) p. 3.

<sup>206</sup> UNICEF and International Telecommunications Union, *Guidelines for industry on child protection* (2015) p. 8.

<sup>207</sup> See, for example, International Telecommunications Union, *Guidelines for policy-makers on Child Protection Online* (2020).

<sup>208</sup> International Covenant on Civil and Political Rights, article 19(2); and Convention on the Rights of the Child, article 15.

<sup>209</sup> International Covenant on Civil and Political Rights, article 21; and Convention on the Rights of the Child, article 15.

The digital environment can enable children to form their social, religious, cultural, ethnic, sexual and political identities and to participate in associated communities and in public spaces for deliberation, cultural exchange, social cohesion and diversity. Children reported that the digital environment provided them with valued opportunities to meet, exchange and deliberate with peers, decision makers and others who shared their interests.

States parties should ensure that their laws, regulations and policies protect children's right to participate in organizations that operate partially or exclusively in the digital environment. No restrictions may be placed on the exercise by children of their right to freedom of association and peaceful assembly in the digital environment other than those that are lawful, necessary and proportionate...Such participation should be safe, private and free from surveillance by public or private entities.

Public visibility and networking opportunities in the digital environment can also support child-led activism and can empower children as advocates for human rights. The Committee recognizes that the digital environment enables children, including children human rights defenders, as well as children in vulnerable situations, to communicate with each other, advocate for their rights and form associations. States parties should support them, including by facilitating the creation of specific digital spaces, and ensure their safety.<sup>210</sup>

1.145 It has also guided that:

The digital environment can include gender-stereotyped, discriminatory, racist, violent, pornographic and exploitative information, as well as false narratives, misinformation and disinformation and information encouraging children to engage in unlawful or harmful activities...States parties should protect children from harmful and untrustworthy content and ensure that relevant businesses and other providers of digital content develop and implement guidelines to enable children to safely access diverse content, recognizing children's rights to information and freedom of expression, while protecting them from such harmful material in accordance with their rights and evolving capacities.<sup>211</sup>

1.146 The UN Committee on the Rights of the Child has further stated that states should encourage providers of digital services used by children to apply concise and intelligible content labelling (for example on the age-appropriateness or trustworthiness of content) and encourage the provision of accessible guidance, training, educational materials and reporting mechanisms for children, parents and

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<sup>210</sup> UN CRC, General Comment 25 (2021) on children's rights in relation to the digital environment, [64]–[66].

<sup>211</sup> UN CRC, General Comment 25 (2021) on children's rights in relation to the digital environment, [54].

caregivers.<sup>212</sup> In addition, it cautions that '[c]ontent controls, school filtering systems and other safety-oriented technologies should not be used to restrict children's access to information in the digital environment; they should be used only to prevent the flow of harmful material to children'.<sup>213</sup>

1.147 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.<sup>214</sup> It also includes the right to control the dissemination of information about one's private life, and can 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.<sup>215</sup> International human rights law recognises that the right to privacy must be protected online.

1.148 In addition, by discriminating against children based on their age, the measure engages and limits the right to equality and non-discrimination.<sup>216</sup> This right provides that everyone is entitled to enjoy their rights without discrimination of any kind (including with respect to age) and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.<sup>217</sup> Differential treatment will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.<sup>218</sup>

1.149 A further relevant consideration is the recognition of the evolving capacities of children under international human rights law. Article 5 of the Convention on the Rights of Child states that:

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<sup>212</sup> UN CRC, General Comment 25 (2021) on children's rights in relation to the digital environment, [55].

<sup>213</sup> UN CRC, General Comment 25 (2021) on children's rights in relation to the digital environment, [56].

<sup>214</sup> International Covenant on Civil and Political Rights, article 17.

<sup>215</sup> 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].

<sup>216</sup> This is noted in the statement of compatibility, p. 13.

<sup>217</sup> International Covenant on Civil and Political Rights, articles 2 and 26, and Convention on the Rights of the Child, article 2 Article 2(2) of the International Covenant on Economic, Social and Cultural Rights also prohibits discrimination specifically in relation to the human rights contained in the International Covenant on Economic, Social and Cultural Rights.

<sup>218</sup> UN Human Rights Committee, *General Comment 18: Non-Discrimination* (1989) [13]; see also *Althammer v Austria*, UN Human Rights Committee Communication No. 998/01 (2003) [10.2].



States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

1.150 The Office of the High Commissioner of Human Rights has explained that article 5 affirms that all children have rights, irrespective of their age, and that, as they grow, develop, mature, and expand their social circle beyond their family, they are entitled to an increasing level of responsibility, agency, and autonomy in the exercise of those rights. It states that children's evolving capacities must be recognised and respected by those adults who provide direction and guidance over children's lives.<sup>219</sup> It states that as children acquire capacities, they are entitled to an increasing level of responsibility for the regulation of matters affecting them, and cautioned that evolving capacities should not be seen as an excuse for practices that restrict children's autonomy and self-expression, 'which are often inaccurately justified by pointing to children's relative immaturity'.<sup>220</sup> The evolving capacity of children to make their own decisions is also recognised in Australian law.<sup>221</sup> The UN Special Rapporteur on the right to privacy, Joseph Cannataci, has noted that age alone has been seen as an imperfect metric to assess the capabilities of children.<sup>222</sup>

1.151 The rights to freedom of expression, freedom of assembly, privacy and equality and non-discrimination may be subject to permissible limitations in relation to children where a limitation is provided by law and is necessary for the purposes stipulated by articles 13 and 15 of the Convention on the Rights of the Child (that is, for respect of the rights or reputations of others; or for the protection of national security or of public order, or of public health or morals). The assessment of whether this measure would constitute a permissible limit on these rights is set out below.

### ***Potential impact on other persons***

#### *Right to privacy; freedom of expression; equality and non-discrimination*

1.152 In addition, by requiring providers to determine the age of *all* service users, a process which would likely require the provision of personal information in order to prove a person's age, this measure would engage and limit the right to privacy and the right to freedom of expression with respect to all persons (regardless of their age). It

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<sup>219</sup> Office of the High Commissioner of Human Rights, Statement of the Committee on the Rights of the Child on article 5 of the Convention on the Rights of the Child (11 October 2023) [5].

<sup>220</sup> Office of the High Commissioner of Human Rights, Statement of the Committee on the Rights of the Child on article 5 of the Convention on the Rights of the Child (11 October 2023) [10].

<sup>221</sup> This is referred to as 'Gillick competence'. See further, Office of the Public Advocate, ['medical treatment for people aged under 18 years'](#).

<sup>222</sup> Report of the Special Rapporteur on the right to privacy, Joseph A. Cannataci, [Artificial intelligence and privacy, and children's privacy](#), 25 January 2021, paragraph [113].

may limit the right to freedom of expression if the requirement to provide personal information in order to prove their age deterred individuals from accessing such material. In this regard, the UN Special Rapporteur on the right to freedom of expression has noted that restrictions on anonymity online 'have a chilling effect, dissuading the free expression of information and ideas' and 'allow for the collection and compilation of large amounts of data by the private sector, placing a significant burden and responsibility on corporate actors to protect the privacy and security of such data'.<sup>223</sup>

1.153 Further, if providers required users to provide an official government proof of age document (such as a proof of age card or drivers licence), this may have a discriminatory impact on people from certain backgrounds in practice. For example, Aboriginal and Torres Strait Islander people may be more likely than others to have no birth certificate (a document which is often required in order to obtain further forms of official identification).<sup>224</sup> In addition, people experiencing homelessness often do not have, and may be unable to afford to obtain, a birth certificate or other documents that prove their identity.<sup>225</sup>

1.154 Further, if this measure did result in a limitation on rights which was not permissible under international human rights law, a person would be required to have access to an effective remedy with respect to that breach. The right to an effective remedy requires the availability of a remedy which is effective with respect to any violation of rights and freedoms recognised by the International Covenant on Civil and Political Rights (including the rights to privacy and freedom of expression).<sup>226</sup> It includes the right to have such a remedy determined by competent judicial, administrative or legislative authorities or by any other competent authority provided for by the legal system of the state. While limitations may be placed in particular circumstances on the nature of the remedy provided (judicial or otherwise), States parties must comply with the fundamental obligation to provide a remedy that is effective.

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<sup>223</sup> [Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression](#), 2013, paragraph [49].

<sup>224</sup> See further, Alannah Calabro, Registering the births of Indigenous Australia: has New South Wales got it right? *UNSW Law Journal* (2013), vol. 36, no. 3, 810.

<sup>225</sup> Australian Human Rights Commission, *Homelessness is a Human Rights Issue* (January 2008).

<sup>226</sup> International Covenant on Civil and Political Rights, article 2(3).

### **Assessment of limitations**

1.155 In order for a limitation to be permissible under international human rights law it must pursue a legitimate objective, be rationally connected to (that is, effective to achieve) that objective and be a proportionate means of achieving that objective.<sup>227</sup>

1.156 The statement of compatibility states that the bill may engage and limit the right to privacy, equality and non-discrimination, and the rights of the child (including with respect to freedom of expression).<sup>228</sup> It states that the bill is intended to enhance the safety and wellbeing of young people online, and to address the proliferation of harms to children and young people.<sup>229</sup> Protecting children from exposure to harmful materials online is a legitimate objective for the purposes of international human rights law and requiring service providers to verify a user's age may be rationally connected to (that is, effective to achieve) this objective, albeit noting that significant questions have been raised about the capacity to achieve this in practice.<sup>230</sup>

1.157 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 factors, including whether a proposed limitation is sufficiently circumscribed, accompanied by sufficient safeguards and the least rights-restrictive way to achieve the stated objective.

1.158 As to whether the measure is circumscribed, a key consideration is the breadth of services to which this age verification requirement may apply. The proposed definition of an 'age-restricted social media platform' is very broad, and may be amended by legislative instrument.<sup>231</sup> The explanatory memorandum states that 'a wide net is cast by the definition, with the intent that the capture would be narrowed by legislative rules made by the Minister', which it states would allow the government to be responsive to changes and evolutions in the social media ecosystem.<sup>232</sup> It states that the government proposes to make legislative rules to exclude messaging applications, online gaming services, and services with the primary purpose of supporting the health and education of end-users from the operation of these

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<sup>227</sup> See, for example, *Leyla Sahin v Turkey*, European Court of Human Rights (Grand Chamber) Application No. 44774/98 (2005); *Al-Adsani v United Kingdom*, European Court of Human Rights (Grand Chamber) Application No. 35763/97 (2001) [53] - [55]; *Manoussakis and Others v Greece*, European Court of Human Rights, Application No. 18748/91 (1996) [36] - [53]. See also the reasoning applied by the High Court of Australia with respect to the proportionality test in *Lange v Australian Broadcasting Corporation* [1997] HCA 25.

<sup>228</sup> Statement of compatibility, pp. 10–16.

<sup>229</sup> Statement of compatibility, p. 10.

<sup>230</sup> See, for example, ANU Reporter, Experts say social media ban a 'blunt instrument', 9 October 2024; and Rania Yallop, 'Kiddy pool policy': Is Australia setting itself up to fail with teen social media ban?, *SBS News*, 7 November 2024.

<sup>231</sup> Schedule 1, item 7, proposed section 63C.

<sup>232</sup> Explanatory memorandum, p. 19.

measures.<sup>233</sup> However, as a matter of law, such services would appear to be captured by the proposed measures unless and until such a discretionary decision was made. Further, the minister may also expand the scope of electronic services to which the definition may apply by legislative instrument, provided they are satisfied that it is reasonably necessary to specify such a service in order to ‘minimise’ harm to age-restricted users.<sup>234</sup>

1.159 In addition, the bill would require that relevant services must take reasonable steps to prevent all children aged under 16 years from having access to their platform. There would be no capacity to treat individual cases differently (having regard to the evolving capacities of children to make their own decisions), but rather all children under 16 would be subject to a blanket ban on access. Rather than restricting the flow of harmful information or content to children, it would instead prevent them from accessing a range of platforms at all. This approach seems inconsistent with the recommendations of the United Nations Committee on the Rights of the Child, and suggests that this aspect of the measure may not be sufficiently circumscribed.

1.160 As to safeguards, the bill highlights the safeguard value of proposed section 63F, which would establish privacy protections relating to personal information which a company has obtained in order to verify a person’s age.<sup>235</sup> It would provide that if an entity holds personal information about an individual that was collected for the purpose of complying with the minimum age obligation, it may only use or disclose that information to:

- (a) determine whether or not the individual is an age-restricted user;
- (b) in circumstances where paragraph 6.2(b), (c), (d) or (e) of the Australian Privacy Principles (APP) applies; or
- (c) for another purpose, with the consent of the individual in accordance with subsection 63F(2).

1.161 The statement of compatibility states that the measure ‘may’ engage the right to privacy ‘if the collection of personal information is necessary in taking reasonable steps’.<sup>236</sup> It is unclear how age confirmation would be possible without identity verification, unless it was through the use of a third-party entity that enables verification of this information without the provider ever having access to it. As to the potential safeguard value of the permissible use and disclosure above, purposes (a) and (c) appear to offer some safeguard value with respect to personal information collected. However, purpose (b) would permit the use and disclosure of personal information for a wide range of purposes, which the explanatory materials do not

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<sup>233</sup> Explanatory memorandum, p. 5.

<sup>234</sup> Schedule 1, item 7, proposed paragraph 63C(1)(b).

<sup>235</sup> Explanatory memorandum, p. 23.

<sup>236</sup> Statement of compatibility, p. 12.

appear to identify. In this regard, the explanatory memorandum states that 'Platforms must not use information and data collected for age assurances purposes for any other purposes, unless the individual has provided their consent'.<sup>237</sup> However, this is incorrect.

1.162 APP 6.2 provides that an entity that holds personal information about an individual can only use or disclose the information for a particular purpose for which it was collected (known as the 'primary purpose' of collection), unless an exception applies. Where an exception applies the entity may use or disclose personal information for another purpose (known as the 'secondary purpose'). Paragraphs 6.2(b), (c), (d) and (e) of APP 6 provide that an entity may use or disclose information as follows:

- the secondary use or disclosure of the personal information is required or authorised by or under an Australian law or a court/tribunal order (APP 6.2(b));
- a 'permitted general situation' exists in relation to the secondary use or disclosure of the personal information by the APP entity (APP 6.2(c));
- the APP entity is an organisation and a permitted health situation (including the collection of information for research relevant to public health or safety) exists in relation to the secondary use or disclosure of the personal information by the organisation (APP 6.2(d));
- the APP entity reasonably believes that the secondary use or disclosure is reasonably necessary for one or more enforcement related activities conducted by, or on behalf of, an enforcement body (APP 6.2(e)).

1.163 Where the entity holding the relevant personal information is an APP entity, a 'permitted general situation' refers to the disclosure of personal information where:

- it is unreasonable or impracticable to obtain the individual's consent to the collection, use or disclosure and the entity reasonably believes that the collection, use or disclosure is necessary to lessen or prevent a serious threat to the life, health or safety of any individual, or to public health or safety;
- the entity has reason to suspect that unlawful activity, or misconduct of a serious nature, that relates to the entity's functions or activities has been, is being or may be engaged in, and reasonably believes that the collection, use or disclosure is necessary in order for the entity to take appropriate action in relation to the matter;
- the entity reasonably believes that the collection, use or disclosure is reasonably necessary: to assist any APP entity, body or person to locate a

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<sup>237</sup> Explanatory memorandum, p. 7.

person who has been reported as missing; for the establishment, exercise or defence of a legal or equitable claim; or for the purposes of a confidential alternative dispute resolution process.<sup>238</sup>

1.164 Consequently, there would appear to be a range of purposes for which a provider would be able to use and disclose any personal information it had collected for the purposes of complying with the age verification requirements (including potentially disclosure to police or other law enforcement bodies) without the consent of the individual. Further, the *Privacy Act 1988* only applies, in general, to businesses with an annual turnover of over \$3 million,<sup>239</sup> and it is therefore unclear what privacy legislation would apply to Australian based service providers who do not meet this criterion. If such data is to be collected and retained by service providers, it would appear this may make such data more at risk of hacking, identity theft and leaks.

1.165 In addition, the eSafety Commissioner would be required to formulate and promote guidelines for the taking of reasonable steps to prevent age-restricted users from having accounts.<sup>240</sup> However, these guidelines would not be binding,<sup>241</sup> and it is not clear that they would require providers to have regard to the human rights of users. There is nothing in the bill itself that specifies that age confirmation methods should be privacy preserving and that a data minimisation approach should be taken. It leaves it to private companies to determine how much, or how little, data to collect on users – while requiring that the company comply with this legislative requirement to verify age. While the bill would provide that if an entity no longer needs personal information about a person, they must take reasonable steps to destroy or de-identify the information,<sup>242</sup> if the provider were required to be able to prove that they have verified the age of a user, it may be that the retention of such information will be considered to be still necessary. It is also unclear how any requirements to delete data would practically be enforced, noting that many large social media companies are multinationals, and that personal data of Australian end-users could be held offshore.

1.166 A further consideration in assessing the proportionality of a measure is whether a less rights restrictive approach would be as effective to achieve the stated objective of the measure. No information is provided in the statement of compatibility to this effect. It is unclear whether less rights restrictive alternatives could be effective to

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<sup>238</sup> *Privacy Act 1988*, section 16A.

<sup>239</sup> Under the *Privacy Act 1988*, privacy obligations apply to an 'APP entity', which is defined in section 6 to mean an agency (government body) or organisation. Section 6C defines an organisation as anyone other than a small business operator. A small business operator is defined in section 6D to have a turnover of \$3 million or less (subject to some exceptions).

<sup>240</sup> Schedule 1, item 5, proposed subsections 27(1)(qa) and (qb).

<sup>241</sup> Explanatory memorandum, p. 18.

<sup>242</sup> Schedule 1, item 7, proposed subsection 63F(3).

achieve the objective of protecting children from harmful materials and other harms online, such as:

- the provision of comprehensive training and guidance materials to parents and children about regulating their own access to online materials, determining the extent of the private information about a child which is publicly accessible online, and reporting illegal or harmful content; or
- requiring social media providers to publish warnings or privacy prompts to users, impose screen time limits for certain applications, and/or provide accessible guidance on protecting safety while online and identifying risks to safety and wellbeing.<sup>243</sup>

1.167 It is also necessary to consider whether the limitation on human rights would be subject to effective oversight and review (matters which are also relevant to consideration of whether a person whose rights were breached would have access to an effective remedy). The bill would require an independent review of the operation of these new measures to occur within two years of the obligations taking effect.<sup>244</sup> As noted above, these obligations would not take effect unless and until the minister were to specify a date for commencement by notifiable legislative instrument. This would mean that such a review may not be undertaken for several years after the measure had commenced. In addition, there is nothing in the bill which would require such a review to have regard to the human rights implications of the measure. As such, it may have limited utility with respect to limitations on human rights. Further, as the bill would impose a blanket requirement to prevent all children aged under 16 years from accessing a potentially wide range of online platforms, it appears that there would be no legal ‘decision’ in relation to which a person affected could seek review by a court.

1.168 While the Australian Human Rights Commission (the AHRC) has indicated that it has ‘serious reservations’ about the proposed ban,<sup>245</sup> it would be unable to consider individual complaints about the conduct of private companies. The AHRC’s statutory functions include to: deal with complaints made to the Commission under the *Australian Human Rights Commission Act 1986* (relating to unlawful discrimination); and to investigate and resolve complaints about alleged breaches of human rights against the Commonwealth and its agencies.<sup>246</sup> This bill would provide that compliance

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<sup>243</sup> In this regard, the explanatory memorandum notes (at p. 2) that ‘Parents and carers feel unsupported to make evidence-based choices about when their children should be on social media’.

<sup>244</sup> Schedule 1, item 16, proposed section 239B.

<sup>245</sup> Australian Human Rights Commission, [Proposed Social Media Ban for Under-16s in Australia](#) (21 November 2024).

<sup>246</sup> Unless the complaint relates to unlawful discrimination or other grounds of discrimination in employment, see *Australian Human Rights Commission Act 1986*, paragraphs 11(1)(aa) and (ab).

with these provisions does not give rise to an age discrimination complaint,<sup>247</sup> and the AHRC does not have the statutory authority to investigate complaints about alleged breaches of human rights (such as the right to freedom of expression or the right to privacy) against private businesses. Consequently, it would appear that the AHRC may have limited capacity to provide oversight of this measure in practice (aside from its broader oversight of Australian laws and policies more generally). There is no information in the explanatory materials as to what other remedies (if any) a person could access regarding a breach of their human rights arising from this measure.

### **Concluding remarks**

1.169 To the extent that this measure may be effective to achieve its stated objectives of protecting children from harms online, it would likely promote several human rights. Although it is noted that the measures would only take legal effect if and when a date was designated by the minister by notifiable instrument.

1.170 However, by restricting the content and platforms to which children aged under 16 may have access (and in which they may form and join groups), this measure would limit the rights of the child including the rights to freedom of expression, freedom of assembly, equality and non-discrimination, and privacy. In addition, by requiring providers to determine the age of *all* services users, a process which would require the provision of personal information in order to prove a person's age, this measure would engage and limit the rights to privacy, freedom of expression, and equality and non-discrimination with respect to all persons (regardless of their age).

1.171 While the bill is directed towards a legitimate objective, and may be capable of achieving it, it is not clear that the measures would constitute a proportionate limit on these rights. The lack of detail in the bill as to how private businesses may be required to comply with the requirement that they do not allow a child aged under 16 years access to certain platforms raises significant concerns that the measure is not sufficiently circumscribed. There appear to be minimal safeguards in the bill with respect to the right to privacy. In the absence of requirements for data minimisation and privacy protection in establishing age verification mechanisms, there is a significant risk that an internet user's privacy may be arbitrarily interfered with by service providers who are required, as a matter of law, to establish an age-verification service. There is also a significant risk that users of all ages may be dissuaded from accessing such services if they would be required to provide significant personal information in order to prove their age (for example, their drivers licence), which would impermissibly limit the right to freedom of expression. Further, it is not clear that this measure would be subject to sufficient oversight and review.

1.172 Significant aspects of the measure appear to be inconsistent with the guidance from the United Nations Committee on the Rights of the Child regarding the rights of children in the digital environment to access information. The imposition of a blanket

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<sup>247</sup> Schedule 1, Part 2, item 17, proposed amendment to the *Age Discrimination Act 2004*.



ban on all children aged under 16 years from accessing online platforms would not permit providers to consider the individual circumstances of different children and would provide no recognition of the evolving capacity of children.

1.173 It also appears that if this measure did result in an impermissible limit on a person's human rights (including the right to privacy or freedom of expression) a person may not have access to an effective remedy with respect to that breach.

1.174 As such, there is a significant risk that the bill would constitute an impermissible limit on numerous human rights.

### **Committee view**

1.175 The committee notes that this bill seeks to amend the *Online Safety Act 2021* to require that providers of 'age-restricted social media platforms' must take 'reasonable steps to prevent' children aged under 16 years from having accounts with such a platform.

1.176 The committee notes that it will ordinarily write to proponents of legislation seeking a response to any questions it has about the compatibility of proposed legislation with human rights. However, in this instance, the committee notes that this bill was referred to the Senate Standing Committee on Environment and Communications for inquiry and report by 26 November 2024. As such, the committee offers its advice as to the human rights compatibility of the bill in order that it may be available to the minister and the Parliament for timely consideration. Absent this tight timeframe the committee would otherwise have written to the minister to seek further information.

1.177 The committee considers that this measure is directed towards the important objective of protecting children from exposure to harms online. The committee considers that to the extent that this measure may be effective to achieve that, it would likely promote several human rights relating to children.

1.178 However, the committee notes that by restricting the content and platforms to which children aged under 16 may have access (and in which they may form and join groups), this measure would limit the rights of the child including the rights to freedom of expression, freedom of assembly, equality and non-discrimination, and privacy. In addition, by requiring providers to determine the age of *all* services users, a process which would require the provision of personal information in order to prove a person's age, this measure would engage and limit the rights to privacy, freedom of expression, and equality and non-discrimination with respect to all persons (regardless of their age).

1.179 The committee considers that while the bill is directed towards a legitimate objective, and may be capable of achieving it, it is not clear that the measures would constitute a proportionate limit on these rights. The lack of detail in the bill as to how private businesses may be required to comply with the requirement that they do not allow a child aged under 16 years access to certain platforms raises significant

concerns that the measure is not sufficiently circumscribed. Further, there appear to be minimal safeguards in the bill with respect to the right to privacy. The committee considers that in the absence of requirements for data minimisation and privacy protection in establishing age verification mechanisms, there is a significant risk that an internet user's privacy may be arbitrarily interfered with by service providers who are required, as a matter of law, to establish an age-verification service, and that users may be dissuaded from accessing such services, which would impermissibly limit the right to freedom of expression. Further, the committee considers that it is not clear that this measure would be subject to sufficient oversight and review.

1.180 The committee also notes that significant aspects of the bill appear to be inconsistent with the guidance from the United Nations Committee on the Rights of the Child regarding the rights of children in the digital environment to access information. In particular, the committee notes imposing a blanket ban on all children aged under 16 years from accessing online platforms which require an account would provide no scope to consider the individual circumstances of different children and no recognition of the concept of the evolving capacity of children.

1.181 The committee further considers that if this measure did result in an impermissible limit on a person's human rights (including the right to privacy or freedom of expression), it is not clear that the person would have access to an effective remedy.

1.182 As such, the committee considers that there is a significant risk that the bill would constitute an impermissible limit on numerous human rights.

### **Suggested action**

1.183 The committee considers the proportionality of this measure may be assisted were the bill amended to:

- (a) amend section 63C to circumscribe the types of platforms which may be 'age-restricted social media platforms';
- (b) require that in implementing an age verification measure, providers must have regard to human rights (including the right to privacy, the right to equality and non-discrimination, and the rights of the child);
- (c) amend proposed paragraphs 27(1)(qa)–(qb) to provide that guidelines made by the eSafety Commissioner are binding, and that the guidelines must require that in implementing an age verification measure, providers must have regard to human rights;
- (d) amend section 63F to strengthen safeguards with respect to the right to privacy (for example, by removing proposed paragraph 63F(1)(b)(ii), or by prohibiting the disclosure of relevant personal information in any circumstances without the consent of the individual);

- (e) amend section 239B to require that an independent review of the measures must assess the compatibility of the legislation with human rights, and the impact of the measure on human rights in practice.

1.184 The committee recommends that the statement of compatibility be updated to provide a more fulsome assessment of the compatibility of the measure with human rights, including the rights of the child, and the rights to an effective remedy, equality and non-discrimination, and privacy (having regard to the numerous exceptions to the proposed privacy safeguards in section 63F which are not analysed in the explanatory materials).

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

**Mr Josh Burns MP**

**Chair**