Chapter 2

Concluded matters

2.1 This chapter considers responses to matters raised previously by the committee. The committee has concluded its examination of these matters on the basis of the responses received.

2.2 Correspondence relating to these matters is available on the committee's website.[1]

Bills

Online Safety Bill 2021[2]

Online Safety (Transitional Provisions and Consequential Amendments) Bill 2021

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

1 See https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

2 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Online Safety Bill 2021 and Online Safety (Transitional Provisions and Consequential Amendments) Bill 2021, *Report 5 of 2021*; [2021] AUPJCHR 50.

2.3 The committee requested a response from the minister in relation to the bill in *Report 3 of 2020*.[3]

Removal of, and disabling of access to, online content

2.4 This bill seeks to establish a new framework for online safety for people in Australia, enabling the minister to determine basic online safety expectations for social media services, electronic services (for example, SMS, chat or other communication services), or internet services (including those which allow individuals to access material online).[4]

2.5 The bill would also establish the office of the eSafety Commissioner (the Commissioner) to administer: a complaints system for cyber-bullying material targeting an Australian child and cyber-abuse material targeting an Australian adult; and a complaints and objection system for non-consensual sharing of intimate images (including images depicting nudity).[5] The Commissioner would also be empowered to enforce online safety by issuing blocking notices, link deletion notices, or app removal notices, to require the removal of online materials depicting abhorrent violent conduct, and certain pornographic and other materials depicting sexual or violent content. Non-compliance would be punishable by a range of civil penalty provisions and enforced through the adoption of enforcement powers contained in the *Regulatory Powers (Standard Provisions) Act 2014*. The bill would also empower the Commissioner to develop industry standards requiring compliance, and enable bodies and associations representing sections of the online industry to also develop their own self-regulatory industry codes.[6]

Summary of initial assessment

Preliminary international human rights legal advice

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

2.6 The bill seeks to enhance the safety of Australian children and adults on the internet by establishing a legislative framework for receiving and investigating individual complaints about online bullying and abuse, and the posting of intimate images without a person's consent. In particular, it seeks to facilitate the timely resolution of complaints about cyber-bullying of children. The bill also seeks to enhance online safety for Australians more generally by establishing mechanisms by

3 Parliamentary Joint Committee on Human Rights, *Report 3 of 2020* (17 March 2021), pp. 2-29.

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

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

6 Part 9, Division 7.

which the Commissioner may require the speedy removal of violent and offensive material, and ensure that individuals do not view such material. It also seeks to build-in flexibility to adapt the scheme to address emerging online harms, including by providing for the development of legislative instruments at a later time.

2.7 As such, the proposed scheme is likely to promote numerous human rights, including the right of women to be free from sexual exploitation, the rights of the child and the right to privacy and reputation. The United Nations (UN) Human Rights Council has stated that the human rights which people have offline must also be protected online.[7] International human rights law recognises that women are vulnerable to sexual exploitation, particularly online, and that States Parties have particular obligations with respect to combatting sources of such exploitation.[8]

2.8 Children also have special rights under human rights law taking into account their particular vulnerabilities,[9] including the right to protection from all forms of violence, maltreatment or sexual exploitation.[10] The international community has recognised the importance of creating a safer online environment for children,[11] and noted the need to establish regulation frameworks which enable users to report concerns about content.[12]

2.9 In addition, international human rights law recognises that the right to privacy must also be protected online. The right to privacy is multi-faceted. It protects against arbitrary and unlawful interferences with an individual's privacy and attacks on reputation.[13] It can also be considered as the presumption that individuals should have an area of autonomous development, interaction and liberty, a 'private sphere' with

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

8 Convention on the Elimination of All Forms of Discrimination Against Women, article 6. See, also, Human Rights Council, *Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective*, A/HRC/38/47 (2018) [14].

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

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

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

12 See, for example, International Telecommunications Union, *Guidelines for policy-makers on Child Protection Online* (2020). See also UN Human Rights Council, *Annual report of the Special Representative of the Secretary-General on Violence against Children*, A/HRC/31/20 (2016) [44] and [51].

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

or without interaction with others, free from excessive unsolicited intervention by other uninvited individuals.[14]

2.10 While the proposed measure appears to promote these rights, in order to achieve its important objectives, it also necessarily engages and limits the right to freedom of expression. The right to freedom of expression includes the freedom to seek, receive and impart information and ideas of all kinds, either orally, in writing or print, in the form of art, or through any other media of an individual's choice.[15] It is not an absolute right. While the right to *hold* an opinion may never be permissibly limited under law,[16] the right to freedom of expression (that is, the freedom to *manifest* one's beliefs or opinions) can be limited.[17] For example, the International Covenant on Civil and Political Rights expressly provides that the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.[18] The International Covenant on the Elimination of Racial Discrimination also requires States to make it an offence to disseminate 'ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin'.[19] These provisions are understood as constituting compulsory limitations on the right to freedom of expression.[20]

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14 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].

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

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

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

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

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

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

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

2.12 As discussed at paragraph [2.6], this bill seeks to achieve a number of important objectives, with the overarching goal of enhancing the online safety of Australians. Several key components of the proposed scheme—relating to the removal of intimate images posted without consent, and material constituting cyber-bullying of an Australian child—would appear to be clearly effective to achieve that objective and, considering the nature of the content being targeted, would likely constitute a proportionate means by which to achieve it. The bill expressly provides that it does not apply to the extent that it would infringe any constitutional doctrine of implied freedom of political expression,[21] which is a useful safeguard. Further, with respect to public oversight of the Commissioner's functions, the bill requires the tabling of an annual report in Parliament.[22]

2.13 However, the bill also seeks to deal with further distinct types of online content, which necessitates an analysis of whether the proposed regulation of access to that content would constitute a proportionate means by which to achieve the important objectives of this bill in each case.[23] This requires consideration of: the extent of the interference with the right to freedom of expression; whether the proposed limitation is sufficiently circumscribed; the presence of sufficient safeguards; and whether any less rights restrictive alternatives could achieve the same stated objective.

Material relating to abhorrent violent conduct

2.14 Part 8 of the bill would enable the Commissioner to either request or require that an internet service provider (ISP) block access to material that promotes, incites, instructs or depicts 'abhorrent violent conduct',[24] if the Commissioner is satisfied that the availability of the material online is likely to cause significant harm to the Australian community.[25] This necessarily limits the right to freedom of expression (while also promoting the rights set out above). Part 8 is clearly intended to provide an important mechanism for the speedy removal of material relating to violent

21 Part 16, clause 233.

22 Part 11, clause 183.

23 See also the initial analysis of material constituting cyber abuse of an Australian adult: Parliamentary Joint Committee on Human Rights, *Report 3 of 2021* (17 March 2021), pp. 7–10.

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

25 Part 8, clause 95.

conduct with the potential to traumatise or radicalise those who view it. This would clearly constitute a very important and legitimate objective, and the measure would appear effective to achieve this objective. In order to assess the proportionality of this measure with the right to freedom of expression, further information is required, in particular:

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

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

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

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

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

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

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

Regulation of online content - class 1 and 2 materials

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

- 'Class 1 material' refers to a film or publication (or the contents of such), computer game, or other material which has been refused classification (or

classified 'RC') under the *Classification (Publications, Films and Computer Games) Act 1995*,[26] or which would likely be refused classification.[27]

- 'Class 2 material' which refers to:
  - material that has been, or would likely be, classified X 18+ and category 2 restricted material (referred to in the explanatory memorandum as mainstream pornography);[28] and
  - material depicting violence, implied sexual violence, simulated sexual activity, coarse language, drug use and nudity that is not suitable for persons under 18 years (hereafter referred to as 'less serious Class 2 material').[29]

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

27 Part 9, clause 106.

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

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

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

2.17 The objective of restricting access to seriously harmful content would likely be legitimate for the purposes of international human rights law. In order to assess the compatibility of this measure with the right to freedom of expression, further information is required, and in particular:

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

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

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

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

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

Committee's initial view

2.18 The committee noted that the Online Safety Bill 2021 is likely to promote numerous human rights. The committee considered that ensuring the safety of Australians online is a significant and evolving challenge, and notes that some Australians—including women and children—are particularly vulnerable to harms online, including sexual exploitation.

2.19 The committee also noted that, by regulating and disabling access to certain harmful online content, this bill necessarily engages and limits the right to freedom of expression. The committee noted that the right to freedom of expression is not

absolute, and may be permissibly limited where a limitation addresses a legitimate objective, is rationally connected to (that is, effective to achieve) that objective, and a proportionate means of doing so. The committee considered that the bill clearly seeks to achieve the important and legitimate objective of enhancing online safety for Australian adults and children in a number of ways, including by providing for the speedy removal of intimate images posted without the subject's consent, or material which constitutes cyber-bullying of an Australian child, and cyber-abuse of an Australian adult. The committee considered that these measures in general appear to permissibly limit the right to freedom of expression.

2.20 However, the committee noted that some clarification is required as to the potential scope of information, and means of regulating access to it, in relation to abhorrent online content, and some adult sexual content, in order to assess whether the proposed limitations with respect to blocking access to this content is proportionate to the objectives of the bill.

2.21 The committee considered further information was required to assess the human rights implications of this bill, and as such sought the minister's advice as to the matters set out at paragraphs [2.14] and [2.17].

2.22 The full initial analysis is set out in *Report 3 of 2021*.

Minister's response[30]

2.23 The minister advised:

> ***Impact on Freedom of Expression***
>
> **a) what is meant by the term 'significant harm' and what guidance would be provided to the Commissioner in determining what reaches the threshold of 'significant harm' (as opposed to 'harm') in practice;**
>
> The intent of the power of the Commissioner to issue blocking requests or notices is to prevent the rapid distribution of abhorrent material online, as occurred, for example, after the 2019 terrorist attacks in Christchurch, New Zealand where the perpetrator streamed the attacks and the footage was shared on many sites.
>
> This power is intended to be used under circumstances where such material is being disseminated online in a manner likely to cause significant harm to the Australian community and that warrants a rapid, coordinated and decisive response by the online industry.
>
> While 'significant harm' is not defined in the Bill, it is a requirement the Commissioner have regard to the three criteria provided in subclauses 95(4)

30 The minister's response to the committee's inquiries was received on 1 April 2021. This is an extract of the response. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

and 99(4) before making a determination that the material met this threshold. These criteria are the nature of the material, the number of end-users likely to access the material and such other matters as are relevant.

In terms of guidance provided to the Commissioner, it is the intention that these powers work in tandem with any protocol developed by the Commissioner, in consultation with ISPs and the Communications Alliance (a key industry organisation for the communications industry), that sets out detailed arrangements for how blocking requests and blocking notices will work.

It should also be noted that the issuing of blocking notices would be subject to merits review by the Administrative Appeals Tribunal under subclause 220(13) and internal review under clause 220A which may provide persuasive guidance about the appropriate threshold of significant harm.

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

Part 8 of the Bill relates to powers of the Commissioner's to issue blocking requests or notices to internet service providers rather than powers to issue removal notices.

Clause 104 of the Online Safety Bill sets out a range of material which would be exempt from the Commissioner's power to request or require blocking. These are based on the defences available in the Criminal Code Act (at section 474.37). Paragraph 104(1)(e) of the Online Safety Bill provides for an exemption for material that relates to a news or current affairs report. There is no implication that the material would need to be created by the journalist involved – rather that material relates to a news report that is created by a professional journalist and is in the public interest. Further, journalistic analysis of material relating to protests of violent police misconduct may remain available given that paragraph 104(1)(h) includes an exemption for accessibility of material for the purpose of advocating for lawful procurement of a change to any matter established by law, policy or practice.

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

It is expected that news and current affairs reports provided by mainstream media sites would meet the public interest test as per clause 104(1)(e)(i).

No specific guidance would be provided to the Commissioner who would be expected to assess this on a case by case basis to balance the interest for the public to be informed about news and current affairs against the expectation that the public would be protected from gratuitous exposure to this material. It is expected that the Commissioner would form a view based

on such resources as the Press Council of Australia standards of practice and broadcasting codes of practice registered with the Australian Communications and Media.[31]

It should also be noted that the issuing of blocking notices would be subject to merits review by the Administrative Appeals Tribunal under subclause 220(13) and internal review under clause 220A.

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

There are no additional specifications or limits other than the examples specified in subclauses 95(2) and 99(2).

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

This is not needed in Part 8 of the Bill because the powers of the Commissioner to order the removal of individual pieces of content are in other parts of the Bill. Clauses 95 and 99 require the Commissioner to have regard to whether any other powers conferred on the Commissioner (such as the removal notices for class 1 material under Part 9 or the AVM notice power under the Criminal Code) could be used to minimise the likelihood that the availability of the material online could cause significant harm to the Australian community. The intention is that this power be used if this is the most effective mechanism to stop the potential harm to a large number of end-users quickly.

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

It is anticipated that in the first instance, the Commissioner would issue a voluntary blocking request. There are no sanctions for non-compliance with a blocking request and the Commissioner may also revoke such a request. Each blocking request must only remain in force for a maximum of 3 months.

It is intended that where an ISP does not comply with a blocking request, the Commissioner may consider issuing a blocking notice. Non-compliance with the requirements under a blocking notice attracts a civil penalty and

31 Standards and codes for TV and radio broadcasters | ACMA

other enforcement mechanisms. Each blocking notice must only remain in force for a maximum of 3 months.

The proposal for an interim blocking notice would be inconsistent with the intent of proposed blocking request and blocking notice powers. Blocking requests and notices are designed to be time-limited to minimise any adverse effects on blocked domains while still achieving the purpose of preventing the harmful proliferation of material that depicts, promotes, incites or instructs in abhorrent violent conduct. Although the maximum time for a blocking notice is three months, it is more likely that the Commissioner would revoke them much sooner than this when the material is no longer available (under clauses 97 and 99).

As noted above, a decision of the Commissioner to issue of blocking notices would be subject to merits review by the Administrative Appeals Tribunal under subclause 220(13) and internal review under the internal review scheme that is required by clause 220A.

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

Clause 97 provides the Commissioner with the power to revoke a blocking request. The Explanatory Memorandum notes that the Commissioner may use this power if the domain or URL ceases to host material subject to the blocking request or if sufficient time has passed to reduce the likelihood of the material reaching a large number of end-users. Similarly, clause 101 provides the Commissioner with the power to revoke a blocking notice.

Online Content Scheme

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

The Bill relies on the categories set out in the *Classification (Publications, Films and Computer Games) Act 1995* (Classification Act). To the extent possible, the principles and community standards that underpin the classification system also underpin the Bill. These principles include that adults should be able to read, hear, see and play what they want and children should be protected from material that may harm or disturb them. The Bill does not prohibit adults from viewing class 2 material online which includes material depicting consensual sex between adults. As described in more detail below, it limits the availability of class 2 material that would be classified 'X18+' material to sites hosted overseas and requires class 2 material provided from Australia, that would be classified 'R18+', to be behind a system limiting access to those under 18 years of age.

Class 1 material is material that has been, or is likely to be, classified 'Refused Classification' under the Classification Act. It contains content that is very high in impact and falls outside generally accepted community standards. It includes non-consensual sexual activity, for example

descriptions or depictions of child sexual abuse or any other exploitative or offensive descriptions or depictions involving a person who is, or appears to be, a child under 18 years, promotion or provision of instruction in paedophile activity, sexual violence and bestiality. It also includes gratuitous, exploitative or offensive depictions of fetishes or practices which are offensive or abhorrent or incest fantasies or other fantasies which are offensive or abhorrent. Offline, films, computer games and publications that are classified 'Refused Classification' cannot be sold, hired, advertised or legally imported in Australia. To the extent possible, the approach taken to this type of material under the Bill is consistent with the offline approach. That is, it should not be accessible to Australian end-users and is subject to removal notices.

Class 2 material may be material that has been, or would likely be, classified 'X18+' or 'Category 2 Restricted' under the Classification Act. This content contains real depictions of actual sexual intercourse and other sexual activity between consenting adults. Any depictions of non-adult persons or adult persons who look like they are under 18 years or portrayed to be minors are not permitted. No violence, coercion or sexually assaultive language is permitted. Fetishes such as body piercing, application of substances such as candle wax, 'golden showers', bondage, spanking or fisting are also not permitted. Offline, X18+ material is restricted to adults and is only available for sale or hire in the Australian Capital Territory and some parts of the Northern Territory. Category 2 Restricted publications may not be publicly displayed and may only be displayed in premises that are restricted to adults such as adult shops. To the extent possible, the approach taken with respect to this type of material under the Bill is consistent with the approach taken offline. That is, in the offline world this type of material should not be displayed in public spaces where it can be accessed by children and online it would be subject to removal notices where available on a service provided from Australia. This approach also recognises the jurisdictional limitations in enforcing Australian community standards overseas.

Class 2 material may also be material that has been, or would likely be, classified 'R18+' or 'Category 1 Restricted' under the Classification Act. This material is considered to be unsuitable for minors and may offend some sections of the adult community. Both offline and online this type of material must be restricted to adults. This is consistent with the principles that adults should be able to read, hear, see and play what they want, minors should be protected from material likely to harm or disturb them and everyone should be protected from exposure to unsolicited material they find offensive.

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

See above - to the extent possible, the approach taken with respect to mainstream pornography under the Bill is consistent with the approach taken offline. That is, it should not be displayed in public spaces where it can be accessed by children and is subject to removal notices where available on a service provided from Australia. The approach also recognises the jurisdictional limitations in enforcing Australian community standards overseas and does not seek to remove X18+ material from services provided from overseas.

This treatment of mainstream pornography under the Bill has not changed - it is the same as the current approach under Schedules 5 and 7 of the *Broadcasting Services Act 1992*. That is, X18+ material must not be provided from or hosted within Australia and is subject to removal notices by the eSafety Commissioner.

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

The nature of the class 1 and class 2 material covered by the proposed online content scheme is such that unrestricted access would be harmful to Australians, particularly children, and accordingly to the extent that the Bill lawfully restricts freedom of speech through these provisions, those restrictions are reasonable, proportionate and necessary to achieve the legitimate objective of protecting Australians online.

In practice, the Commissioner would consider the context or purpose for which the material was published during an investigation, including whether it is in the public interest. Under clause 42 the Commissioner may conduct any investigation as they think fit and…may refuse to investigate a complaint under clause 43.

The approach taken under the Bill with respect to the removal of certain class 2 material provided from Australia is consistent with the approach taken to this type of material offline. Both online and offline systems seek to limit the provision of this type of material while recognising that adults have the right to read, see, hear and play what they want and minors should be protected from material that may harm or disturb them.

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

Clause 108 of the Bill allows the Commissioner to declare by written instrument that a specified access control system or a class of such system is a ‘restricted access system’ in relation to online material for the purposes of the Bill. The purpose of a restricted access system declaration is not to

prevent access to age-restricted content, but to seek to ensure that access is limited to persons 18 years and over and that the methods used for limiting this access meet a minimum standard.

The Commissioner would consult with industry in the development of any restricted access system declaration made under the regime. Industry is best placed to consider the most appropriate system for restricting access to content on their services, including whether a particular system requires the provision of personal information to log in and what protections should be in place to secure that information.

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

The interests of service providers are protected under the scheme through the review of decisions procedures provided by clauses 220 and 220A of the Bill.

Clause 220 provides for the review, by the Administrative Appeals Tribunal (AAT), of certain decisions made by the Commissioner, and sets out who may make an application for such review.

Internal review of the Commissioner's decisions is provided by clause 220A, under which the Commissioner must, by notifiable instrument, formulate a scheme for internal review of decisions of a kind referred to in clause 220. These decisions include review of a decision by the Commissioner under clauses 109, 110, 114, 115, 119, 120, 124 and 128.

Under subclause 220A (2) the internal review scheme may empower the Commissioner to, on application, review such a decision and affirm, vary or revoke the decision concerned.

Concluding comments

International human rights legal advice

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

Material relating to abhorrent violent conduct

2.24 Part 8 would enable the Commissioner to request or require that an internet service provider (ISP) block access to material that promotes, incites, instructs or

depicts 'abhorrent violent conduct',[32] where satisfied that the availability of the material online is likely to cause significant harm to the Australian community.[33]

2.25 As to the meaning of the term 'significant harm', the minister stated that, while the term is not defined, the Commissioner must have regard to: the nature of the material; the number of end-users who are likely to access it; and such other matters (if any) which they consider relevant.[34] The minister stated that these powers are intended to operate in tandem with any protocol developed by the Commissioner, in consultation with ISPs and the Communications Alliance (an industry organisation). The minister advised that it is intended for the Commissioner's blocking request and notice powers to be used to prevent the rapid distribution of abhorrent materials online, such as the footage of the 2019 Christchurch terrorist attack, where its dissemination would likely cause significant harm to the Australian community, and in circumstances which warrant a rapid, coordinated and decisive response by the online industry. If the exercise of this power is utilised in circumstances such as that provided in this example, having regard not merely to the nature of the content but also to the likelihood of its rapid distribution online, it appears that this aspect of the Commissioner's blocking request and notice powers may be sufficiently circumscribed.

2.26 As to the scope of materials that would be subject to the Commissioner's blocking powers, the minister advised that material that relates to a news report created by a journalist (but where the material was not itself created by the journalist), and that is regarded as being in the public interest, would be exempt. Based on the minister's response, this would appear to mean, therefore, that raw video footage of a violent conflict filmed by a non-journalist would not be blocked on the basis that it is likely to cause significant harm to the Australian community, where it is related to journalistic analysis of such conflict. The minister further stated that 'journalistic analysis of material relating to protests of violent police misconduct may remain available' given that paragraph 104(1)(h) includes an exemption for accessibility of material for the purpose of advocating for lawful procurement of a change to any matter established by law, policy or practice. The minister stated that no specific guidance would be given to the Commissioner in determining whether access to materials is in the 'public interest'. He advised that the Commissioner would be expected to assess this on a case by case basis, to balance the interest for the public to be informed about news and current affairs against the expectation that the public would be protected from 'gratuitous exposure' to material. The minister stated that it is expected that news and current affairs reports from mainstream media websites would meet the public interest test. The minister further stated that it is expected that

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

33 Part 8, clause 95.

34 These criteria are provided for in proposed subclauses 95(4) and 99(4).

the Commissioner would form a view based on resources such as the Australian Press Council Standards of Practice, and the Australian Communications and Media Authority's Standards and Codes for TV and radio broadcasters. Clause 104 would, therefore, appear to have the capacity to serve as an important safeguard with respect to the continued availability of specific types of content depicting violence, where the availability has important social or legal utility.

2.27 As to the range of steps that the Commissioner could specify in a blocking notice or request, the minister stated that there are not additional specifications or limitations beyond those set out in subclauses 95(2) and 99(2). That is, a notice may specify steps to block domain names, URLs or IP addresses which provide access to the relevant material. As a matter of statutory interpretation, the term 'the following are examples of steps that may be specified in a blocking request' does not establish an exhaustive list of powers. Rather, these proposed subclauses provide three examples of steps that *may* be specified in a blocking notice or request (appearing to suggest that other steps of a different nature, and beyond these stated steps, could be specified). Further, it would appear likely that each of the stated examples would themselves consist of a series of more specific steps in practice, and because they are not specified in the bill it is not clear what they may entail. This raises some questions as to whether the Commissioner's proposed blocking notice and request power is sufficiently constrained. The minister further stated that it is intended that the Commissioner will develop a protocol setting out detailed arrangements for how notices and requests would work. However, it is noted that this does not appear to be a legislative requirement.

2.28 Further information was also sought as to whether any less rights restrictive alternatives—such as providing for a content removal power, rather than a blocking power—would be as effective to achieve the aims of Part 8 of the bill. The minister advised that Part 8 of the bill does not specify that the Commissioner may require the removal of an individual piece of (or class of) content because the Commissioner has the power to do this in other parts of the bill, and must have regard to whether such other powers could instead be used.[35] Given that the Commissioner's removal notice powers in Part 9 of the bill operate in relation to content which would be refused classification under the *Classification (Publications, Films and Computer Games) Act 1995*, this would appear to capture material relating to abhorrent violent conduct.[36] In addition, the minister noted that the Criminal Code empowers the Commissioner to issue abhorrent violent material notices to content and hosting services.[37] Such notices put a provider on notice that their services are being used to access or host abhorrent violent material, and establish a presumption in any future prosecution that

35 Subclauses 95(5) and 99(5).

36 See, Part 9.

37 *Criminal Code Act 1995*, Part 10.6, Subdivision H.

the provider was reckless as to whether that material could be accessed from their service.[38] Given that the Commissioner would be required to turn their mind to the suitability of using any of these other powers before issuing a blocking notice or request, this may have the effect of limiting the use of the blocking power in practice, and would appear to serve as an important safeguard.

2.29 As to why it would not be as effective to provide for an interim blocking notice of short duration followed by a blocking notice of longer duration, the minister stated that an interim blocking notice would be inconsistent with the intent of the proposed blocking powers, which are designed to be time-limited but prevent the harmful proliferation of material related to abhorrent violent conduct. The minister stated that it is anticipated that, in the first instance, the Commissioner would issue a blocking request, and if this were not complied with, then subsequently consider issuing a blocking notice.[39] However, this two-step process is not reflected in the bill itself.

2.30 Lastly, clarification was sought as to why the Commissioner would not be required to revoke a blocking notice or request should circumstances relevantly change prior to its original expiration. The minister stated that while such requests and notices can remain in force for up to three months, it is more likely that the Commissioner would revoke them sooner, once the material is no longer available. The minister noted that the Commissioner may use their power to revoke a blocking request or notice if the material ceases to be hosted, or if sufficient time has passed, to reduce the likelihood of the material reaching a large number of end-users. This has the capacity to serve as an important safeguard in practice, although it should be noted that the bill does not require the Commissioner to turn their mind to the ongoing necessity of a specific blocking request or notice.

2.31 In conclusion, it appears that the scope of the content which could be covered by the proposed abhorrent violent material blocking scheme is appropriately circumscribed, noting that clause 104 would appear to ensure that where the availability of such material has some important social or legal utility, this will not be liable to blocking. However, as a matter of statutory interpretation, the full range of steps which could be specified under a blocking notice or request is unclear, and the bill does not require the Commissioner to develop a process to specify this. This raises some questions as to the way this power may be exercised in practice. The minister has stated that it is anticipated that, in the first instance, the Commissioner would issue a blocking request (which carries no sanction for non-compliance), and if this were not complied with, then subsequently consider issuing a blocking notice. Given that advice, it would appear that the proportionality of the proposed scheme with

38 *Criminal Code Act 1995*, sections 474.35–474.36.

39 In this regard it is noted that the Commissioner has issued just 23 abhorrent violent content notices under the Criminal Code to date. See, Ms Julie Inman Grant, eSafety Commissioner, Senate Standing Committee on Environment and Communications (Estimates), *Hansard*, 23 March 2021, p. 117.

respect to the right to freedom of expression would be strengthened were this two-step approach to be reflected in the bill, while retaining a discretion to issue a blocking notice in urgent cases. Lastly, with respect to oversight of such decisions, the minister has noted the availability of both internal review, and merits review in the Administrative Appeals Tribunal (which is proposed as a government amendment to the bill).[40] These are important safeguards which would appear to enable affected providers to seek review of notices or decisions with which they disagreed.

Regulation of online content – class 1 and 2 materials

2.32 Part 9 of the bill would enable the Commissioner to require that a social media service, electronic service, designated internet service, or a hosting service provider remove, or otherwise deny or restrict access to two classes of materials (which may be broadly described as depictions of serious sexual and criminal content; mainstream pornographic content; and less serious sexual and adult content).

2.33 Further information was sought in relation to the right to freedom of expression as to what evidence demonstrates that each aspect of the proposed scheme would be effective to achieve the stated objective of dealing with seriously harmful content, access to which, if unrestricted, would be harmful to Australians, particularly children.[41] In particular, further information was sought as to the evidence that demonstrates that the *full* range of materials which would fall within Classes 1 and 2 (including material depicting consensual sex between adults) would be harmful to adult end-users. The minister advised that this scheme seeks to adopt the same regulatory approach to sexual content as available on films, computer games and publications: that some of the content should not be accessible to any Australian person, and some should not be displayed in public spaces where it can be accessed by children. The minister stated that class 1 material is material which has been, or is likely to be, refused classification under the *Classification (Publications, Films and Computer Games) Act 1995* because it falls outside of generally accepted community standards, and may include depictions of fetishes or practices which are offensive.[42] As to class 2 material (that is, mainstream pornography, and less serious sexual and adult content), the minister stated that this material is unsuitable for minors and may offend some sections of the adult community, and so access to it should be restricted

40 Clause 220A would be inserted as a proposed government amendment to the bill introduced in the Senate (sheet SW125).

41 See, statement of compatibility, p. 58. While the term 'harm' is not defined in the bill, clause 5 defines 'serious harm' as being 'serious physical harm or serious harm to a person's mental health, whether temporary or permanent'.

42 Further, based on the minister's description of materials which would fall within class 2 content, it would appear that class 1 would also capture sexual content between consenting adults that includes 'fetishes such as body piercing, application of substances such as candle wax, 'golden showers', bondage, spanking or fisting'.

to adults.[43] The minister stated that this is consistent with the principles that adults should be able to read, hear, see and play what they want, minors should be protected from material likely to harm or disturb them, and everyone should be protected from unsolicited material they find offensive. However, the mere fact that a depiction of a sexual activity between consenting adults may fall outside of 'generally accepted community standards' does not appear to demonstrate that the viewing of such content by an adult will cause harm to them (noting that the consequence of an order made under Part 9 may be to deny to all internet users – not just children – access to such material). In addition, the bill would empower the Commissioner to require that less serious sexual content (including content depicting nudity) be removed or cease to be hosted. It is not clear that access to the *full* range of content which would fall within this category may necessarily cause harm to adults, or to children. As such, some questions remain as to whether and how specific aspects of the proposed online content scheme would be rationally connected (that is, effective to achieve) the objective of preventing harm.

2.34 As to whether this scheme would constitute a proportionate means by which to achieve its objective, further information was sought about why the Commissioner would be empowered to require the removal of mainstream pornography, rather than requiring that it must be accessible only via a restricted access system. The minister stated that the proposed approach with respect to mainstream pornography online is intended to be the same as that taken offline: that it should not be displayed in public places where it can be accessed by children. He noted that offline, mainstream pornographic material is only available for sale or hire in the Australian Capital Territory and parts of the Northern Territory. The minister further stated that, recognising the jurisdictional limitations preventing the requirement to remove mainstream pornography from services hosted overseas, the bill would only provide for the removal of mainstream pornographic content provided from or hosted within Australia. However, it is not clear that empowering the Commissioner to require the removal of mainstream pornographic content from an Australian website or hosting service would be a proportionate means by which to achieve the stated objective of ensuring that pornography is not displayed in 'public places'. In particular, it is not clear that the presence of mainstream sexual content on a specific website can be directly equated to the public display of pornography in a physical location such as a shop accessible by children (noting that parental control mechanisms can be utilised to prevent access to sexual content on websites, and that individual websites may themselves restrict access to their content). Further, given that the stated intention is to ensure that children cannot access mainstream pornographic content (among other

43 However, the Commissioner would appear to be empowered to require the removal of class 2 materials, including mainstream pornographic content and material depicting nudity. Paragraphs 119(2)(f) and 120(1)(g) would, as matter of statutory interpretation, appear to permit the Commissioner to require that a service *either* restrict access to material behind a restricted access system *or* require that that it be removed.

content), and not to prevent adults from accessing such content, it would appear it may be equally as effective to instead empower the Commissioner to require that such content be accessible only via some form of restricted access system.

2.35 In terms of the manner in which these powers may be exercised in practice, further information was sought as to why the bill could not require that the Commissioner must consider: the purpose for which that content was published (for example, an educative, academic, medical, or health-related purpose); whether it would be in the public interest to remove material (on the basis that it may be unsuitable for a child to view, but may be reasonable for an adult to have access to); and how the interests of affected parties and end users would be affected. The minister noted that the Commissioner may conduct any investigation as they think fit pursuant to clause 42, and may also refuse to investigate a complaint under clause 43. The minister stated that in practice, the Commissioner would consider the context or purpose for which the material was published during an investigation, including whether it is in the public interest. However, the bill would not require the Commissioner to turn their mind to such matters in making these decisions. As such, it would appear that any safeguard value associated with the Commissioner's decision-making in this regard would be at their discretion. Where a measure limits a human right, discretionary or administrative safeguards alone may not be sufficient for the purpose of a permissible limitation under international human rights law.[44] This is because administrative and discretionary safeguards are less stringent than the protection of statutory processes and can be amended or removed at any time.

2.36 Further information was also sought as to the types of systems the Commissioner could declare (by written instrument) to be a 'restricted access system', and whether these would require the provision of personal information in order to login. The minister stated that the Commissioner would consult with industry in the development of such a declaration, including considerations of whether a particular system would require the provision of personal information to login. It remains unclear, therefore, as to what type of system could be declared, and whether a person would need to provide any personal information (such as their name, and date of birth) to access restricted content. In this regard it is relevant that there do not appear to be any international examples of a mandatory online scheme for age verification for online pornography.[45] This means that the extent to which such a restricted access system could interfere with a person's privacy is not clear at this stage, nor is the extent to which the requirement for certain content to be contained behind a

44 See, for example, Human Rights Committee, *General Comment 27, Freedom of movement (Art.12)* (1999).

45 This matter has recently been considered at length in the House of Representatives Standing Committee on Social Policy and Legal Affairs, *Protecting the age of innocence: Report of the inquiry into age verification for online wagering and online pornography* (February 2020) pp. 46–60.

restricted access system may interfere with the right to freedom of expression (for example, by deterring adults from accessing it).[46]

2.37 Lastly, further information was sought as to why this scheme could not provide for the issue of an interim removal, link-deletion, app removal, or remedial notice, followed by a further order only once the relevant service had been given the opportunity to make submissions as to the appropriateness of the content remaining accessible. The minister stated that the interests of providers are protected under proposed new clauses 220 (which provides for review by the AAT), and 220A (which would require the Commissioner to establish an internal review scheme by notifiable instrument).[47] The minister noted that such an internal review scheme may empower the Commissioner to review a decision, and subsequently to affirm, vary or revoke it. As such, these proposed review mechanisms may provide oversight of these powers, which may assist with the proportionality of the measure with respect to the right to freedom of expression. However, it should be noted that it is proposed that an internal review scheme to be established under clause 220A would be established by notifiable instrument, and so would not be liable to a human rights assessment.[48]

2.38 In conclusion, Part 9 of the bill seeks to deal with a very wide range of online content, from the most serious child sexual abuse material and terrorism-related content, through to less serious nude or consensual sexual-related content which is deemed unsuitable for a minor to see or read. It would permit the Commissioner to require the removal of class 1 and some class 2 materials, which includes all pornographic content. This is largely because the bill would import the existing scheme for classifying films, computers games and publications as set out in the *Classification (Publications, Films and Computer Games) Act 1995* and associated documents. While the stated objective of Part 9 is to protect people from harm, and requiring the removal of such content would clearly appear to be effective to protect children from harm, there are questions as to a causal nexus between the viewing of pornographic content by an adult and harm being caused to them. This is also relevant to the

46 Mr David Kaye, special rapporteur on the promotion and protection of the right to freedom of opinion and expression, has previously expressed concern with respect to a proposed age verification scheme to access online pornographic content in the United Kingdom, noting that the character of the digital space differs from the context of offline classification, and the potential eradication of anonymous expression, as well as specific concerns with respect to the collection, storage and protection of personal information. See, correspondence to Mr Julian Braithwaite, Ambassador, Permanent Mission of the United Kingdom to the United Nations (9 January 2017) https://ohchr.org/Documents/Issues/Opinion/Legislation/UK_DigitalEconomyBill_OLGBR1.2017.pdf (accessed 14 April 2021).

47 Clause 220A would be inserted as a proposed government amendment to the bill introduced in the Senate (sheet SW125).

48 Subsection 7(a) of the *Human Rights (Parliamentary Scrutiny) Act 2011* provides that the committee may examine bills and legislative instruments. This does not extend to notifiable instruments, which are a separate category of instrument under the *Legislation Act 2003*.

proportionality of the proposed scheme. In this regard, it remains unclear why, instead of requiring the removal of pornographic content, a less rights restrictive approach of requiring that pornographic content must only be accessible via a restricted access system (while retaining a discretion to require the removal of some more serious kinds of pornographic content) would not be as effective to achieve the stated objectives of the scheme, and to prevent children from accessing that content. In addition, it remains unclear what personal information, if any, a restricted access system may require an end-user to provide in order to access content. Further, while the minister has advised that in practice the Commissioner would consider the context or purpose for which such material was published in determining whether to issue a remedial notice, the bill would not require them to turn their mind to this, or to any specific matters (such as whether content depicting nudity has been produced for, or may serve, an educative function, including for children). As such, it does not appear that this power is sufficiently circumscribed, and it is not clear how the Commissioner would exercise their discretion to allow some content to remain accessible to all persons. It would appear to depend on how the Commissioner elected to exercise their broad discretionary powers in practice. As such, as currently drafted Part 9 of the bill does not appear to be a permissible limitation on the right to freedom of expression.

Committee view

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

2.40 The committee notes that the extent of the eSafety Commissioner's work to date demonstrates the vital importance of their role, noting in particular that in September 2018, the eSafety Commissioner reported having undertaken more than 8,000 investigations into child abuse content, representing approximately 35,000 images and videos referred for removal. Consequently, the committee considers that this bill is likely to promote the rights of the child, including by protecting them from exposure to harmful materials online, and from cyber-bullying material. The committee also considers that the bill is likely to promote the right of women to be free from sexual exploitation, and the right to privacy and reputation, including by providing for the removal of cyber-abuse material targeting an Australian adult, and of non-consensual intimate images.

2.41 The committee also notes that, by regulating and disabling access to certain harmful online content, this bill necessarily engages and limits the right to freedom

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

2.42 However, the committee considers that there are some specific areas in which the proposed scheme could be amended to ensure that the Commissioner's proposed powers to remove or otherwise regulate access to specific forms of content is sufficiently circumscribed and appropriately targeted. These relate to material that depicts abhorrent violent conduct (Part 8), and 'online content' related to sex and nudity (Part 9). The committee considers that the proposed regulation of material depicting abhorrent violent conduct appears to be appropriately circumscribed, although it notes that some of the proposed safeguards could be further strengthened without compromising the intent of the scheme. As to Part 9, the committee considers that it has not been established that the proposed scheme for regulating online content—including sexual content—is sufficiently circumscribed such that it constitutes a permissible limitation on the right to freedom of expression.

Suggested action

2.43 With respect to material that depicts abhorrent violent conduct, the committee considers the proportionality of the proposed scheme may be assisted if the bill were amended as follows:

- **(a) amend subclauses 95(2) and 99(2) to provide that the list of steps that may be specified in a blocking request or notice are those set out in the legislation (and that those are not simply 'examples' of steps that may be taken);**
- **(b) amend clauses 95 and 99 to establish a process by which the Commissioner may generally only issue a blocking notice after having issued a blocking request which has not been complied with, while retaining the power to immediately issue a blocking notice in urgent cases.**

2.44 With respect to the proposed online content scheme, the committee considers the proportionality of the proposed scheme may be assisted if the bill were amended as follows:

(a) amend clauses 114 and 115 to provide that, in addition to a removal power, the Commissioner may issue to a social media, electronic or designated internet service a remedial notice requiring they take all reasonable steps to ensure that access to relevant material is subject to a restricted access system;

(b) amend clauses 119 and 120 to provide that, in determining whether to issue a remedial notice with respect to less serious class 2 content, the Commissioner must consider the purpose for which that content was published; whether it is in the public interest to require either the removal of, or the restriction of access to, that content; and the extent to which the interests of relevant parties and end-users would be affected; and

(c) amend subclause 108(4) to require the Commissioner, in making such a declaration, to have regard to: the extent to which a specific system may interfere with the end-users' right to privacy; the extent of any personal information which it may require users to provide; and the strength of any data protection mechanisms in place to protect personal information required to be provided.

2.45 The committee recommends that the statement of compatibility with human rights be updated to reflect the information which has been provided by the minister.

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

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

2.47 The bill would establish a complaints mechanism for material which an ordinary person would conclude is likely intended to have the effect of seriously threatening, intimidating, harassing or humiliating an Australian child.[49] Information gathered by the Commissioner in investigating this complaint can be disclosed to a number of specified bodies and persons, including to a teacher or school principal, or to a parent or guardian of an Australian child, if the Commissioner is satisfied the information will assist in the resolution of the complaint.[50]

49 Part 1, clause 30.

50 Part 15, clauses 213 and 214.

Summary of initial assessment

Preliminary international human rights legal advice

Rights of the child

2.48 Enabling the Commissioner to share information about a complaint of cyber-bullying with teachers, principals, parents and guardians, engages the rights of the child. Australia is required to ensure that, in all actions concerning children, the best interests of the child are a primary consideration.[51] This requires legislative bodies to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.[52] Children also have the right to privacy.[53] States Parties are also required to assure to a child capable of forming his or her own views the right to express those views freely in all matters affecting the child.[54] The views of the child must be given due weight in accordance with the age and maturity of the child.

2.49 It appears likely that these measures could have the effect of promoting the rights of the child, insofar as the disclosure may help to quickly resolve the cyberbullying complaint. However, if the personal information relating to the child's complaint is shared with teachers and principals, and parents and guardians (be it the parent or guardian of the complainant or the parent or guardian of the child accused of cyber-bullying), without the child's consent[55] and against their wishes, this may limit the child's right to privacy, the obligation to take into account the best interests of the child and their right to express their views in matters that affect them. Most of the rights of the child may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

2.50 It is clear that the objective of the measure is to assist in resolving complaints of cyber-bullying, which would constitute a legitimate objective for the purposes of international human rights law. Disclosing information to teachers, principals, parents and guardians would appear to be rationally connected to this objective. In order to assess the compatibility of this measure with the rights of the child, further information is required as to:

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

52 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).

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

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

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

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

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

Committee's initial view

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

2.52 The committee considered further information was required to assess the human rights implications of this measure, and as such sought the minister's advice as to the matters set out at paragraph [2.50].

2.53 The full initial analysis is set out in *Report 3 of 2021*.

Minister's response

2.54 The minister advised:

Disclosure of information and rights of the child

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

Article 3(1) of the *Convention on the Rights of the Child* (CROC) provides that in all actions concerning children, the best interests of the child shall be a primary consideration. Subclause 24 (1) of the Bill provides that the Commissioner must have regard to the CROC in the performance of their functions. The Bill supports the best interests of the child by providing mechanisms so that children are protected from cyber-bullying.

The CROC also recognises the right of a child not to be subjected to unlawful attacks on their honour and reputation. By providing remedies for a child who is the target of such material, the Bill advances these rights.

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

Under subclause 213(1), the Commissioner may disclose information to a teacher or school principal if satisfied that the information will assist in the resolution of a complaint about cyberbullying of a child made under clause 30 of the Bill. For example, where cyber-bullying involves a group of school students, enlisting the help of the school or schools attended by the students may be the quickest and most effective means of resolving the complaint. Subclause 213(2) allows the Commissioner to impose written conditions to be complied with in relation to information disclosed under subclause 213(1). For example, the Commissioner may impose a condition preventing secondary disclosures to third parties.

Similarly, subclause 214(1) enables the Commissioner to disclose information to a parent or guardian of an Australian child if the Commissioner is satisfied that the information will assist in the resolution of a complaint made under clause 30 of the Bill. Subclause 214(2) allows the Commissioner to impose written conditions to be complied with in relation to information disclosed under subclause 214(1). Such conditions may include a requirement preventing secondary disclosures to third parties.

Resolution of a complaint by teachers or principals, or parents or guardians, has advantages over the more formal regulatory channels available under the Bill. Disclosure under clauses 213 and 214 may help quickly resolve the cyber-bullying complaint and as such promote the rights of the child.

It would be expected that the Commissioner would consider the child's views, consistent with the child's age and maturity, in deciding whether or not to exercise the Commissioner's discretion to disclose information under clauses 213 and 214. Part 15 of the Bill provides that the Commissioner may disclose information in certain circumstances. It should be noted that Part 15 does not require disclosure.

Concluding comments

International human rights legal advice

Rights of the child

2.55 The minister noted that article 3 of the Convention on the Rights of the Child provides that in all actions concerning children, the best interests of the child shall be a primary consideration. As to how this would apply to the Commissioner's consideration of whether to disclose information to teachers, principals, parents and

guardians, the minister stated that subclauses 213(2) and 214(2) allow the Commissioner to prevent secondary disclosure to third parties. The minister stated that it is expected that the Commissioner would consider the child's views, consistent with the child's age and maturity, in deciding whether to exercise their discretion to disclose information.

2.56 The UN Committee on the Rights of the Child has provided clear guidance as to how the Convention on the Rights of the Child is to be interpreted, and the obligations which it establishes. Foremost, it has stated that the best interests of the child is not just one consideration among other equal considerations, rather it is a 'primary' consideration, as compared with other considerations.[56] Further, the UN Committee has explained that when determining a child's best interests, the child's views must be taken into account, consistent with their evolving capacities and taking into account their characteristics (pursuant to article 12 of the Convention).[57] It has explained that article 12 of the Convention has the effect that any decision that does not take into account the child's views or does not give their views due weight according to their age and maturity, does not respect the possibility for the child or children to influence the determination of their best interests.[58] The UN Committee on the Rights of the Child has also emphasised that children have a right to privacy, which takes on increasing significance during adolescence.[59]

2.57 As the bill provides that the Commissioner must, as appropriate, have regard to the Convention on the Rights of the Child and as the minister has stated that it is expected that the Commissioner would consider the child's views, consistent with the child's age and maturity, in deciding whether to exercise their discretion to disclose information, it may be that these disclosure powers would be exercised in a manner which is consistent with the Convention on the Rights of the Child. However, this would appear to depend on the way the Commissioner exercised this discretion in practice. Having regard to the guidance provided by the UN Committee on the Rights

56 The UN Committee on the Rights of the Child has explained that 'the expression 'primary consideration' [in article 3(1) of the Convention on the Rights of the Child] means that the child's best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child'. See, 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].

57 UN Committee on the Rights of the Child, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013) [43]. See also, *General Comment No. 20 on the implementation of the rights of the child during adolescence* (2016) [22].

58 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) [53].

59 UN Committee on the Rights of the Child, *General Comment No. 20 on the implementation of the rights of the child during adolescence* (2016) [46].

of the Child as to the correct interpretation of the Convention, it would appear that in some decisions (particularly those relating to older children), the Commissioner would be required to consider the views of the child in determining what is in their best interests. As such, having a more explicit requirement that the Commissioner take into account the views of the child who made the complaint as to the disclosure of information to teachers, principals, parents or guardians, would strengthen the compliance of this measure with the rights of the child.

Committee view

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

2.59 The committee considers that if the disclosure may help to quickly resolve the cyberbullying complaint, these powers could have the effect of promoting the rights of the child. However, the committee notes that if the personal information relating to the child's complaint is shared against the child's wishes this may limit the child's right to privacy, the obligation to take into account the best interests of the child and their right to express their views in matters that affect them. In particular, the committee notes that an assessment of what is in the child's best interests may require the Commissioner to have regard to the child's own views, depending on their age and level of maturity.

Suggested action

2.60 The committee considers that the bill contains an important overarching safeguard in that it requires the Commissioner to, as appropriate, have regard to the Convention on the Rights of the Child in exercising their powers. The committee considers that this may be sufficient to adequately protect the rights of the child. However, the committee considers that this safeguard may be strengthened were clauses 213 and 214 amended to specifically clarify that, when considering whether to disclose information to teachers, school principals, parents or guardians relating to a complaint made by a child about cyber-bullying, the Commissioner must, depending on the age and maturity of an individual child, consider the child's views as to the disclosure.

2.61 The committee also recommends that the statement of compatibility with human rights be updated to reflect the information provided by the minister.

2.62 The committee draws this matter to the attention of the minister and the Parliament.

Disclosure of information to authorities of foreign countries

2.63 The bill also provides that any information obtained by the Commissioner using these new powers[60] can be disclosed to a number of listed authorities, including certain authorities of a foreign country where the Commissioner is satisfied that the information will enable or assist the foreign authority to perform or exercise their relevant functions or powers.[61] The relevant authorities of the foreign countries are those that are responsible for regulating matters or enforcing laws of that country relating to the safe use of certain internet services and material that is accessible to the end-users of certain internet services. The Commissioner may impose conditions to be complied with when disclosing such information.[62]

Summary of initial assessment

Preliminary international human rights legal advice

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

2.64 By authorising the disclosure of information obtained by the Commissioner, including personal information, to the authorities of foreign countries for the purpose of assisting them to perform or exercise any of their functions or powers, the measure engages and limits the right to privacy. The right to privacy includes respect for informational privacy, including the right to respect for private and confidential information, particularly the storing, use and sharing of such information.[63] It also includes the right to control the dissemination of information about one's private life. The right to privacy may be subject to permissible limitations where the limitation pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.

2.65 In addition, to the extent that the measure would authorise the disclosure of personal information to foreign authorities responsible for enforcing laws of the foreign country, where this may be used to investigate and convict a person of an offence to which the death penalty applies, the right to life may be engaged and limited. The right to life imposes an obligation on Australia to protect people from

60 Part 15, clause 207.

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

62 Part 15, subclause 212(2).

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

being killed by others or identified risks.[64] While the International Covenant on Civil and Political Rights does not completely prohibit the imposition of the death penalty, international law prohibits states which have abolished the death penalty (such as Australia) from exposing a person to the death penalty in another state. This includes prohibiting the provision of information to other countries that may use that information to investigate and convict someone of an offence to which the death penalty applies.[65] Additionally, it is not clear if sharing information with the authorities of certain foreign countries could risk exposing a person to torture or cruel, inhuman or degrading treatment or punishment. Australia has an obligation not to subject any person to torture or to cruel, inhuman or degrading treatment or punishment.[66] Under international law the prohibition on torture is absolute and can never be subject to permissible limitations.[67]

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

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

(b) what conditions is it expected the Commissioner will impose on the disclosure of information with the authority of a foreign country and what are the consequences, if any, of that authority failing to comply with those conditions, particularly where an individual's right to privacy is not protected;

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

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

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

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

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

personal information, and protection of personal information from unauthorised disclosure;

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

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

(i) the approval process for authorising disclosure;

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

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

Committee's initial view

2.67 The committee noted that authorising the disclosure of this information, which may include personal information, to the authorities of foreign countries engages and limits the right to privacy. The committee considered that enhancing the ability of foreign authorities to protect the interests of children and victims of cyber-abuse constitutes a legitimate objective, and authorising the sharing of information obtained by the Commissioner may be effective to achieve that important objective. However, the committee noted that some questions remain as to whether the measure is proportionate to achieving that objective.

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

2.69 The committee considered further information was required to assess the human rights implications of this measure, and as such sought the minister's advice as to the matters set out at paragraph [2.66].

2.70 The full initial analysis is set out in *Report 3 of 2021*.

Minister's response

2.71 The minister advised:

Disclosure of information to the authority of a foreign country and human rights

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

Part 15 of the Bill deals with the disclosure of information and provides that the Commissioner may disclose information in certain circumstances. Part 15 only applies to information that was obtained by the Commissioner as a result of the performance of a function, or the exercise of a power, conferred on the Commissioner by or under this Act. Consequently the Part does not provide for the disclosure of all information the Commissioner may receive or have access to.

Subclause 212(1) of the Bill authorises the Commissioner to disclose information to any of a variety of authorities listed in that clause, if satisfied that the information will enable or assist the authority to perform or exercise any of its functions or powers. This disclosure enables these authorities to function to its maximum extent to protect the best interests of affected children and victims of cyber-abuse or image-based abuse. The Commissioner would be expected not to disclose personal information about victims without their consent.

b) what conditions is it expected the Commissioner will impose on the disclosure of information with the authority of a foreign country and what are the consequences, if any, of that authority failing to comply with those conditions, particularly where an individual's right to privacy is not protected;

To ensure adequate protection of privacy, subclause 212(2) contains a provision which empowers the Commissioner, by writing, to impose conditions to be complied with in relation to information disclosed under this clause. This may include, for example, conditions that prevent further disclosure by the recipient to third parties.

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

The Commissioner may disclose information to designated foreign authorities only, who are responsible for regulating matters or enforcing laws relating to the safe use of certain internet services or material accessible to the end-users of certain internet services.

Paragraph 212(1)(h) and paragraph 212(1)(i) allows the Commissioner to disclose information to an authority of a foreign country that is responsible for regulating matters or enforcing laws of that country relating to either or

both the capacity of individuals to use social media services, relevant electronic services and designated internet services in a safe manner, or material that is accessible to, or delivered to, end-users of social media services, relevant electronic services and designated internet services. For example, the Commissioner may disclose information to the United States Department of Justice or the Commissioner's counterpart (i.e. Online Safety Commissioner) in another country.

As stated in the previous response, to ensure adequate protection of privacy, subclause 212(2) empowers the Commissioner, by writing, to impose conditions to be complied with in relation to information disclosed under this clause.

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

The disclosure of information is at the discretion of the Commissioner, limited only to regulators or law enforcement agencies dealing with online safety and can be subject to further conditions.

Subclause 212(1) of the Bill provides the Commissioner may disclose information to any of a variety of authorities listed in that clause, if satisfied that the information will enable or assist the authority to perform or exercise any of its functions or powers.

Paragraph 212(1)(h) and paragraph 212(1)(i) allows the Commissioner to disclose information to an authority of a foreign country that is responsible for regulating matters or enforcing laws of that country relating to either or both the capacity of individuals to use social media services, relevant electronic services and designated internet services in a safe manner, or material that is accessible to, or delivered to, end-users of social media services, relevant electronic services and designated internet services.

Subclause 212(2) allows the Commissioner to impose written conditions to be complied with in relation to information disclosed under subclause 212(1). This provides a safeguard by which the Commissioner may limit further disclosure of the information, where it is appropriate to do so.

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

(i) the approval process for authorising disclosure;

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

(iii) whether there will be a requirement to decline to disclose information where there is a risk that it may expose a person to

the death penalty or to torture or cruel, inhuman or degrading treatment or punishment.

By authorising the disclosure of information obtained by the Commissioner, to the authorities of foreign countries for the purpose of assisting them to perform or exercise any of their functions or powers, clause 212 engages and limits the right to privacy. However, the provision is necessary to allow the authorities to protect the best interests of affected children and victims of cyber-abuse and image-based abuse.

To ensure adequate protection of privacy, subclause 212(2) empowers the Commissioner to impose conditions to be complied with in relation to information disclosed under this clause, which may include, for example, conditions that prevent further disclosure to third parties.

Where information is provided to foreign law enforcement, it would be provided via Australian Federal Police and Interpol. Any information provided would therefore be consistent with the protocol of not disclosing law enforcement information to foreign agencies in circumstances where it might lead to prosecution involving the death penalty.

Concluding comments

International human rights legal advice

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

2.72 The minister noted that subclause 212(1) authorises the Commissioner to disclose information to a variety of authorities listed in that clause, if satisfied that the information will enable or assist the authority to perform or exercise any of its functions or powers. The minister indicated that such disclosure would enable those authorities to function to their maximum extent to protect the best interests of affected children and victims of cyber-abuse or image-based abuse, stating that the Commissioner would be 'expected' not to disclose personal information about victims without their consent. He further noted that paragraphs 212(1)(h) and (i) only enable the Commissioner to disclose information to certain types of authorities of foreign countries, that is, those who are responsible for regulating matters or enforcing laws relating to either or both the capacity of individuals to use social media services, relevant electronic services and designated internet services in a safe manner, or material that is accessible to end users. However, Part 15 of the bill does not restrict these information-sharing powers to investigations of child and other cyber-abuse. (It instead covers any information obtained by the Commissioner exercising their powers and functions.) Further, while the minister has stated that the Commissioner would be expected not to disclose personal information about a victim without their consent, there is no legislative requirement not to do so and it is not clear that they would not share personal information about other persons. Consequently, the scope of personal information that may be disclosed to the authority of a foreign country pursuant to Part 15 is not clear.

2.73 The minister further noted that subclause 212(2) empowers the Commissioner to impose conditions on the information disclosure, such as conditions to prevent further disclosure of the information to a third party. This has the capacity to serve as an important safeguard with respect to the right to privacy. However, no information has been provided as to whether and how such conditions would be enforced, and whether any consequences would flow from non-compliance with a condition, nor why the legislation does not itself require that such conditions be imposed.

2.74 Further information was sought as to the level of risk that the disclosure of personal information in this context could expose a person to the risk of the death penalty, or to torture or other cruel, inhuman or degrading treatment or punishment. However, no information was provided as to an assessment of such a level of risk. The minister stated that clause 212 does enable the Commissioner to impose conditions on the uses of information being disclosed in order to ensure adequate protection of the right to privacy, and advised that where information was being provided to foreign law enforcement, it would be provided via the Australian Federal Police and Interpol, meaning that any information provided would therefore be consistent with the protocol of not disclosing law enforcement information to foreign agencies in circumstances where it might lead to prosecution involving the death penalty. This may serve as an important safeguard (although noting that there have been instances of information being shared by Australian law enforcement agencies which have resulted in the imposition of the death penalty in the past).[68] However, no information has been provided as to protocols against the sharing of information by a law enforcement agency in circumstances where it might expose a person to the risk of torture or other cruel, inhuman or degrading treatment or punishment, and it is not clear what guidelines would operate with respect to the Commissioner. Further, there may be a risk that information being shared with foreign agencies *other than* law enforcement agencies could still expose an individual to a risk of harm, depending on the nature of the information and the jurisdiction in question.

2.75 Having regard to the range of information which would be liable to sharing by the Commissioner under this bill, and the many different foreign jurisdictions in which that information may be received and handled, it has not been established that the disclosure powers provided for in Part 15 would be accompanied by sufficient safeguards such that they would permissibly limit the right to privacy or adequately

68 For example, in 2005, the Australian Federal Police shared information with Indonesian authorities leading to the arrest of nine Australians in Indonesia, and subsequent convictions for attempting to smuggle drugs into the country. Two of those Australians were then executed. In 2009, the UN Committee on Civil and Political Rights noted concern as to Australia's lack of a comprehensive prohibition on the provision of international police assistance for the investigation of crimes that may lead to the imposition of the death penalty in another state, in violation of the State party's obligation under the Second Optional Protocol. See, *Concluding Observations on Australia*, UN Doc CCPR/C/AUS/CO/5, 7 May 2009, [20].

protect persons from exposure to the risk of the death penalty, or torture or other cruel, inhuman or degrading treatment or punishment.

Committee view

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

2.77 The committee notes that authorising the disclosure of this information, which may include personal information, to the authorities of foreign countries engages and limits the right to privacy. The committee also notes that to the extent that the measure would authorise the disclosure of personal information to foreign authorities responsible for enforcing laws of the foreign country, where this may be used to investigate and convict a person of an offence to which the death penalty applies, the right to life may be engaged and limited.

2.78 The committee considers that it has not been clearly established that this proposed scheme is accompanied by sufficiently stringent safeguards such that it would ensure the adequate protection of personal information in all cases, or ensure that the sharing of information will not expose a person to the risk of the death penalty, or torture or other cruel, inhuman or degrading treatment or punishment. The committee considers that this is significant, noting the myriad foreign jurisdictions with which, and circumstances in which, information could be shared under Part 15 of the bill, and hence the risk that information-sharing may, in certain circumstances, lead to a person being harmed as a result.

Suggested action

2.79 The committee considers that the compatibility of the proposed information disclosure scheme may be strengthened were Part 15 of the bill amended to provide that:

(a) the Commissioner must not share information with any foreign entity where the Commissioner considers that there is an unacceptable risk that doing so may expose a person to the death penalty, or any risk of them being subjected to torture or other cruel, inhuman or degrading treatment or punishment;

(b) the Commissioner must impose conditions in relation to privacy protections around the handling of personal information, and protection of personal information from unauthorised disclosure; and

(c) the Commissioner must develop guidelines setting out the consequences for a failure to comply with conditions attached to the disclosure of information, and a process by which to assess the risk of information sharing exposing a person to the death penalty, or other cruel, inhuman or degrading treatment or punishment in individual cases.

2.80 The committee further recommends that the statement of compatibility with human rights be updated to address the engagement of the right to life, and the absolute prohibition against torture and other cruel, inhuman or degrading treatment or punishment.

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

Sydney Harbour Federation Trust Amendment Bill 2021[1]

Purpose	This bill seeks to amend the *Sydney Harbour Federation Trust Act 2001* to establish the Sydney Harbour Federation Trust as an ongoing entity, and amend its operational powers
Portfolio	Agriculture, Water and the Environment
Introduced	House of Representatives, 18 March 2021
Rights	Freedom of expression; freedom of assembly

2.82 The committee requested a response from the minister in relation to the bill in *Report 4 of 2021*.[2]

Prohibition on public assembly

2.83 This bill would establish the Sydney Harbour Federation Trust (the Trust) as an ongoing entity.[3] It would also establish powers under the *Sydney Harbour Federation Trust Act 2001* (the Act) for the Trust to order that any person engaged in promoting, conducting or carrying out certain activity on Trust land must cease doing so, or must do (or not do) such things in relation to the activity as are specified in the order, and in the manner specified.[4] The Trust could make such an order if the Trust reasonably believes that the activity contravenes a range of matters, including that the activity contravenes the regulations. A person would commit a strict liability offence if the person does not comply with the order, punishable by up to 10 penalty units (or $2,220).[5]

2.84 Section 11 of the current Sydney Harbour Federation Trust Regulations 2001 (the regulations) provides that it is an offence for a person to 'organise or participate in a public assembly on Trust land'.[6] A 'public assembly' is defined in section 11(3) to include an organised assembly of persons for the purpose of holding a meeting, demonstration, procession or performance. The activity that would otherwise be an

1 This entry can be cited as: Parliamentary Joint Committee on Human Rights, Sydney Harbour Federation Trust Amendment Bill 2021, *Report 5 of 2021*; [2021] AUPJCHR 51.

2 Parliamentary Joint Committee on Human Rights, *Report 4 of 2020* (31 March 2021), pp. 2-5.

3 Schedule 1, Part 1, items 1–3, and 9.

4 Schedule 1, Part 3, item 13, proposed subsection 65B(1).

5 Schedule 1, Part 3, item 13, proposed section 65D.

6 'Trust land' is defined in section 3 and listed in Schedules 1 and 2 of the Act. It includes a number of Lots in Middle Head, Georges Heights, Woolwich, and Cockatoo Island.

offence under section 11 is not an offence if it 'is authorised by a licence or permit' granted by the Trust.[7]

Summary of initial assessment

Preliminary international human rights legal advice

Rights to freedom of expression and assembly

2.85 By providing for the enforcement of a prohibition against organising or participating in organised assemblies, this bill engages and appears to limit the rights to freedom of expression and assembly. The right to freedom of expression extends to the communication of information or ideas through any medium, including public protest.[8] The right to freedom of assembly protects the freedom of individuals and groups to meet and engage in peaceful protest and other forms of collective activity in public.[9] These rights may be permissibly limited where a measure seeks to achieve a legitimate objective, is rationally connected to (that is, effective to achieve) that objective, and is a proportionate means by which to achieve it. In order for a measure to be directed towards a legitimate objective for the purposes of these two rights, a limitation must be demonstrated to be necessary to protect: the rights or reputations of others; national security; public order; or public health or morals.[10] Further, in determining whether limitations on the freedom of expression are proportionate, the UN Human Rights Committee has previously noted that restrictions on the freedom of expression must not be overly broad.[11]

2.86 Consequently, in order to assess the extent to which this bill engages and may limit the rights to freedom of expression and assembly, further information is required, and in particular:

(a) whether it is intended that section 11 of the Sydney Harbour Federation Trust Regulations 2001 will be retained as drafted, retained subject to amendments, or removed;

(b) how the organisation of, or participation in, a public assembly (including a meeting, demonstration, procession, performance, or sporting event) on Trust land would constitute a threat to public order or public health;

(c) what safeguards exist to protect the rights to freedom of expression and assembly, noting that the regulations establish a broadly defined

7 Sydney Harbour Federation Trust Regulations 2001 [F2010C0026], subsection 23(d).

8 International Covenant on Civil and Political Rights, article 19.

9 International Covenant on Civil and Political Rights, article 21.

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

11 UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [34]-[35].

prohibition on a public assembly which would appear to include assemblies which may pose no threat to public order on public lands (including how often has the Trust issued or refused to issue a permit for the carrying out of assemblies, and on what basis); and

(d) why other, less rights restrictive alternatives (such as only prohibiting activities contravening regulations which constitute a public hazard or a risk to public health) would not be effective to achieve the objective of this measure.

Committee's initial view

2.87 The committee noted that this measure appeared to constitute a prohibition on public assemblies in these areas, unless the Trust otherwise grants a permit to allow an assembly to take place. The committee noted that this engages and appears to limit the rights to freedom of expression and assembly. The committee noted that these rights may be permissibly limited where a limitation is reasonable, necessary and proportionate.

2.88 The committee noted that the Attorney-General previously advised the committee that the regulations are being considered as part of a broader independent review of the work of the Trust, and that consideration of whether the approach taken with respect to public assemblies remains appropriate would be undertaken during that review, and with respect to the development of replacement regulations.[12] However, the committee noted that the explanatory memorandum accompanying this bill states that the regulations are anticipated to be 'remade with minor changes to their operation',[13] and that the *Independent Review of the Sydney Harbour Federation Trust 2020* does not appear to discuss proposed amendments to the regulations relating to these matters.[14] As such, the committee considered that it was not clear whether it is intended that this aspect of the regulations will be retained. The committee noted that this is the chief consideration in its assessment of the extent to which this bill engages and may limit the rights to freedom of expression and assembly, and as such sought the minister's advice as to the matters set out at paragraph [2.86].

2.89 The full initial analysis is set out in *Report 4 of 2021*.

12 Parliamentary Joint committee on Human Rights, *Report 4 of 2020* (9 April 2020) Sydney Harbour Federation Trust Regulations 2001 [F2010C0026], p. 101.

13 Explanatory memorandum, p. 13.

14 See, Carolyn McNally and Erin Flaherty, *Independent Review of the Sydney Harbour Federation Trust* (2020) https://www.environment.gov.au/system/files/consultations/65d51c8f-27e6-4c72-b1b2-e7fe8f0764fb/files/shft-review-final-report.pdf (accessed 22 March 2021).

Minister's response[15]

2.90 The minister advised:

> The Government is in the process of remaking the *Sydney Harbour Federation Trust Regulations 2001* (the Regulations), which are due to sunset on 1 October 2021.
>
> In doing this, the intention is to redraft regulation 11 to ensure it is consistent with Australia's international human rights obligations.
>
> When the Harbour Trust was first formed, the sites were un-remediated and closed to the public with many public health hazards. The regulations drafted in 2001 were, at the time, considered necessary for protecting the public from threats posed by un-remediated sites.
>
> With most of the Trust's sites now remediated and open to the public, it is intended that regulation 11 will now be amended to be more explicitly compatible with the right of peaceful assembly contained in Article 21 of the International Covenant on Civil and Political Rights.

Concluding comments

International human rights legal advice

Rights to freedom of expression and assembly

2.91 The rights to freedom of expression and assembly appeared to be engaged by this bill, as the bill would establish powers for the Sydney Harbour Federation Trust to make an order against any person engaged in promoting, conducting or carrying out certain activity on Trust land, including where the activity contravenes the regulations.[16] Section 11 of the current regulations provides that it is an offence for a person to 'organise or participate in a public assembly on Trust land',[17] which includes an organised assembly of persons for the purpose of holding a meeting, demonstration, procession or performance.[18]

2.92 The minister advised that the government is in the process of remaking these regulations, which are due to sunset on 1 October 2021, and intends to re-draft regulation 11 to ensure it is consistent with Australia's international human rights obligations, and in particular, be more explicitly compatible with the right of peaceful

15 The minister's response to the committee's inquiries was received on 14 April 2021. This is an extract of the response. The response is available in full on the committee's website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports.

16 Schedule 1, Part 3, item 13, proposed subsection 65B(1).

17 'Trust land' is defined in section 3 and listed in Schedules 1 and 2 of the Act. It includes a number of Lots in Middle Head, Georges Heights, Woolwich, and Cockatoo Island.

18 Sydney Harbour Federation Trust Regulations 2001 [F2010C0026], subsection 23(d).

assembly. Consequently, if such amendments are made and the regulations are made compatible with these rights, it appears that the bill would not engage the rights to freedom of expression and assembly.

Committee view

2.93 The committee thanks the minister for this response. The committee notes that the bill seeks to establish the Sydney Harbour Federation Trust as an ongoing entity, and empower it to enforce compliance with a range of matters related to Trust lands, including matters provided for under the regulations, which currently make it an offence for a person to organise or participate in a public assembly on Trust land.

2.94 The committee welcomes the minister's advice that the government is in the process of remaking the current regulations to ensure they are consistent with Australia's international human rights obligations, and are more explicitly compatible with the right of peaceful assembly. As such, if such amendments are made to the regulations, the committee considers that the bill does not engage the rights to freedom of expression and assembly. The committee will assess any future regulations once they are registered.

Suggested action

2.95 The committee recommends that consideration be given to updating the explanatory memorandum and statement of compatibility with human rights to reflect the information which has been provided by the minister.

Dr Anne Webster MP

Chair